87-1178

No. .....

In The

Supreme Court of the United States

October Term, 1987

TRIPLE-A BASEBALL CLUB ASSOCIATES, TRIPLE-A BASEBALL CLUB OF MAINE, INC., and JORDAN I. KOBRITZ,

Petitioners,

v.

NORTHEASTERN BASEBALL, INC., and MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY

Respondents

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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164 pp

QUESTION PRESENTED FOR REVIEW

Where the United States District Court found for Plaintiff and held that a contract had terminated under its own terms, did not reach Defendants' counterclaim, and did not make any factual findings with respect to Defendants' prayer for specific performance, did the United States Circuit Court of Appeals improperly usurp the role of the District Court in directing the District Court to enter an order of specific performance when it reversed the District Court's holding on a question of law?

RULE 28.1 LISTING

Triple-A Baseball Club Associates is a Maine limited partnership. Triple-A Baseball Club of Maine, Inc. is one of two general partners of Triple-A Baseball Club Associates. Triple-A Baseball Club of Maine, Inc. is a Maine corporation one hundred percent of whose stock is owned by Jordan I. Kobritz, the other general partner of Triple-A Baseball Club Associates.

LIST OF PARTIES BELOW

The parties below were:

Triple-A Baseball Club Associates,
Triple-A Baseball Club of Maine, Inc.,

and

Jordan I. Kobritz

Plaintiffs

and

Northeastern Baseball, Inc.,
Multi-Purpose Stadium Authority of Lackawanna County,

and

International League of Professional Baseball Clubs, Inc.

Defendants/Cross and Counter Claimants

Petitioners believe that the International League of Professional Baseball Clubs, Inc. has no interest in this petition, which seeks review of the remedy ordered by the United States Court of Appeals for the First Circuit as between Triple-A Baseball Club Associates, *et al.*, and Northeastern Baseball, Inc., and Multi-Purpose Stadium Authority of Lackawanna County. Copies of this Petition as well as a notice pursuant to Rule 19.6 of the Supreme Court Rules have been served upon all parties below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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NORTHEASTERN BASEBALL, INC., and MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Triple-A Baseball Club Associates, Triple-A Baseball Club of Maine, Inc., and Jordan I. Kobritz respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States

Court of Appeals for the First Circuit, entered in the above-entitled proceeding on October 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 832 F.2d 214, and is reprinted in the appendix hereto, p. App. 1, *infra*.

The opinion of the United States District Court for the District of Maine (Carter, D.J.) is reported at 655 F.Supp. 513, and is reprinted in the appendix hereto, p. App. 51, *infra*.

JURISDICTION

The United States District Court for the District of Maine had jurisdiction over this matter pursuant to 28 U.S.C. § 1332. Judgment was entered by the United States District Court for the District of Maine on February 20, 1987, followed by the issuance of the District Court's Findings of Fact, Conclusions of Law and Opinion on March 11, 1987. An order dismissing as moot the International League of Professional Baseball Clubs, Inc.'s indemnity claims, which had been bifurcated from the other issues in the matter, was issued on March 13, 1987. *See generally*, pp. App. 46, 51, 130, *infra*.

Respondents appealed, Petitioners cross-appealed, and the United States Court of Appeals for the First Circuit entered a Judgment and Opinion on October 13, 1987, re-

versing the District Court's holding, and remanding for an entry of a specific performance decree in conformity with its opinion. *See* p. App. 1, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rules of the Supreme Court of the United States

Rule 17.1—A review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. (a) When a Federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

This case arises from a contractual dispute between Triple-A Baseball Club Associates and its general partners, Jordan I. Kobritz and Triple-A Baseball Club of Maine, Inc. (hereinafter collectively "Triple-A"), and Northeastern Baseball, Inc. ("NBI"). Under an agree-

ment signed September 3, 1986 which was the product of several months of negotiation, Triple-A was to transfer to NBI its AAA baseball team, the Maine Guides, in exchange for NBI's AA baseball team, the Waterbury Indians,[1] plus $2,000,000. The deal was structured so that NBI would pay $2,400,000 for the AAA team, and Triple-A would pay $400,000 for the AA team.

Under the constitutions of the respective leagues to which the teams belonged, i.e., the International League of Professional Baseball Clubs (AAA) and the Eastern League of Professional Baseball Clubs (AA), team franchises may not be sold or transferred without approval of a majority of the league members. The September 3 Agreement provided that, in the event the Eastern League refused to approve the sale of the AA franchise to Triple-A, the agreement would continue in effect and the purchase price for the AAA franchise in that event would be $2,000,000.

On the same day, a side agreement was entered into between Jordan I. Kobritz individually and NBI, superceded by a written agreement entered into on September 4, 1986, whereby NBI agreed that, in the event the Eastern League should refuse to approve the sale of the AA team to Triple-A, NBI would sell the team to Jordan I. Kobritz for $500,000 and Jordan I. Kobritz would act as a consultant to NBI for a ten-year period in consideration of $50,000 per year in payment. The side agreement was necessary because it was envisioned that the Eastern League might balk at permitting a transfer to Triple-A

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[1] Most recently the Williamsport, Pennsylvania Bills.

itself because of opposition voiced by some of Triple-A's limited partners. The September 4 Agreement further provided that, in the event the Eastern League denied approval of the sale to both Triple-A and to Jordan I. Kobritz, the consulting agreement would remain in effect. Kobritz later assigned the September 4 Agreement to Triple-A Baseball Club Associates.

Triple-A had operated the AAA team in Maine for several years, and was the only professional baseball team in Maine. Because it was having difficulty meeting its financial obligations, it desired to acquire a AA team, which is cheaper to run. NBI, on the other hand, had long desired to bring AAA baseball to the Scranton, Pennsylvania area. Because it experienced some difficulty in acquiring a AAA team, it had acquired a AA team and intended to bring it to Scranton to play until such time as it could acquire a AAA team.

In order to prevent the oversaturation of baseball markets, professional baseball teams and leagues acquire "territorial rights" in the areas immediately surrounding their home field locations. NBI was aware that the Eastern League considered that it had territorial rights to the Scranton area, and that NBI would encounter resistance in displacing AA baseball from the Scranton area when it acquired a AAA team.[2] Disputes concerning territorial rights between minor league teams and between the minor leagues themselves are resolved by the National Association, which has a voluminous constitution and by-

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[2] The AA team never actually played in Scranton, but it was clear to NBI and its President John McGee that the Eastern League unequivocally considered Scranton to be its territory.

laws and a mechanism established thereby for resolving such disputes.

When the September 3 Agreement was executed, the principals for both teams, Jordan Kobritz and John McGee, arranged for their respective leagues to have meetings to consider the proposed transfers. A meeting of the Eastern League was scheduled for September 6, 1986, and a meeting of the International League was scheduled for September 9, 1986.

Almost immediately after the signing of the September 3 Agreement, however, it became known to John McGee that the Eastern League would not agree to any transfer of the AA team to anybody until the Eastern League's territorial rights claim to Scranton was resolved. The Eastern League's demand for indemnification for its loss of territorial rights to Scranton should NBI acquire a AAA team rapidly became a demand for relinquishment of the franchise itself to the league, in exchange for NBI being allowed to bring the AAA team to Scranton. By the same token, the International League made it known to McGee that it would not approve the transfer of the AAA team until it was sure that the Eastern League would make no claim to Scranton.

Without even attempting to resort to the National Association procedures for resolving such a dispute, and without informing Kobritz prior to his decision, McGee agreed to relinquish the team to the Eastern League in

order not to jeopardize the approval of the transfer of the AAA team to NBI on September 9.[3]

The International League approved the transfer of the AAA team to NBI on September 9. The approval did not effect the transfer of the team, but was only a prerequisite to the transfer, which was to take place at the closing. Although no closing had occurred, and was not scheduled to occur until October 21, 1986, the International League began to treat NBI as the owner of the team in subsequent League proceedings. At the September 9 meeting, NBI designated Multi-Purpose Stadium Authority of Lackawanna County ("MPSA") as the franchise owner.

At an NBI board meeting on September 10, the NBI Board voted to relinquish the AA team to the Eastern League; shortly thereafter, a written agreement was entered into between the Eastern League and NBI to relinquish the team upon NBI's acquisition of a AAA team.

When Kobritz was informed of the NBI Board's action, he informed McGee that the deal was off. Kobritz so informed NBI several times, and, at subsequent International League meetings during the month of December, Kobritz attempted to be recognized as a director (a right

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[3] It was disputed at trial whether McGee ever informed Kobritz of his agreement to relinquish the team prior to the September 9 meeting of the International League; the District Court found that McGee had informed Kobritz on the morning of September 9, despite Kobritz' testimony to the contrary. In any case, however, McGee did not tell Kobritz that the relinquishment of the Double-A team was inevitable, but told him that NBI would continue to attempt to resolve the Eastern League's territorial claim through cash indemnification.

that flows from franchise ownership), but was not officially seated at the meetings and was not allowed to vote.

On October 20, 1986, NBI formally assigned all its rights in the AAA franchise to MPSA.

At the October 21 closing, Triple-A refused to convey its AAA team to NBI when informed by NBI that it would not convey its AA team. That same day, Triple-A commenced this action in the United States District Court for the District of Maine seeking a declaration of the rights of the parties (Triple-A and NBI) with respect to the ownership of the Triple-A franchise and whether any obligations remained under the September 3 and September 4 agreements. The complaint was later amended to include actions for damages against NBI and MPSA, and consolidated with a separate action filed against the International League on November 7, 1986, after the International League failed to act to restore Triple-A to its rightful position as franchise holder, even after it became aware of the fact that no conveyance had occurred. Triple-A further sought declaratory and injunctive relief against NBI and MPSA to the effect that Triple-A should be relieved of any duty to transfer the AAA team to NBI, and sought avoidance of the transfer of the franchise from NBI to MPSA. Triple-A sought damages against NBI and MPSA for loss of the team and disruption of Triple-A's ability to conduct its business. Similarly, Triple-A sought from the International League damages for conversion, and sought declaratory and injunctive relief to the effect that the International League should recognize Triple-A as the valid holder of the franchise.

NBI counterclaimed against Triple-A seeking a declaratory judgment that the September 3 Agreement re-

mained an effect, and an order of specific performance requiring Triple-A to transfer the AAA team to NBI. NBI also sought damages.

The International League counterclaimed against Triple-A, cross claimed against NBI, and brought a third party complaint against MPSA.

The case was tried without a jury in January 1987, on an expedited basis by an agreement of all parties, who sought a swift resolution of the dispute in order to minimize the disruption to the baseball season and the work necessary to prepare for it. The Court denied NBI's motion to bifurcate the damages portion of the trial, but did bifurcate the International League's indemnity claims against NBI and MPSA. The trial lasted five days. The Court issued its judgment on February 20, 1987, and issued its findings of fact and conclusions of law on March 11, 1987. An order dismissing the International League's indemnity claims as moot was issued on March 13, 1987.

The Court held, *inter alia,* that the September 3 Agreement had terminated by its own terms, and was of no force and effect, due to the failure to occur of an implied condition precedent. The Court found that the Eastern League had demanded relinquishment of the franchise solely to resolve its independent dispute with NBI, and not because it disapproved the sale to Triple-A. The Court's decision was based on its factual finding that the Eastern League had never approved or refused to approve—on the merits as intended by the parties—the transfer of the AA team to Triple-A, in accordance with organized baseball's normal procedure of interviewing the prospective buyer and evaluating the merits of the transfer as to that particular

buyer, and that such a consideration of the transfer on its merits was an implied condition precedent to the contract.

The Court arrived at its decision in the light of extensive testimony presented on the traditional practices and course of dealings in organized baseball. The Court held, therefore, that Triple-A was not obligated to convey the AAA team, and that no damages were called for. The Court further held that neither NBI, MPSA, nor the International League had converted Triple-A's property, and did not reach the question whether NBI had repudiated or breached the September 3 Agreement. The Court did hold, however, that the International League's failure to act in accordance with its own constitution constituted a breach of contract, and held that the International League should recognize Triple-A as the franchise holder. The Court explicitly did not reach the questions presented by NBI's counterclaim and its prayer for specific performance.

All four parties filed timely notices of appeal. The First Circuit issued its opinion in October, 1987, reversing in part and affirming in part the District Court's opinion. Generally, the Court held that the District Court had erred in its holding that the September 3 Agreement was ambiguous, and in its interpretation of the phrase "refused to approve" as used in the September 3 Agreement. The First Circuit further held that it was error for the District Court to consider extrinsic evidence concerning the parties' intended meaning for that phrase.[4]

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[4] Triple-A disputes both the First Circuit's view that Maine law precluded the consideration of this extrinsic evidence, and the First Circuit's holding that the words "refused to approve"

(Continued on following page)

In view of its interpretation of Maine law, and its interpretation of the contract, the First Circuit held that the Eastern League had refused to approve the transfer of the AA franchise, and that Triple-A was contractually obligated to transfer the AAA franchise to NBI in accordance with the terms of the contract. Although it did not expressly say so, the First Circuit clearly held not only that the District Court had erred in holding that the contract had terminated under its own terms, but further held that Triple-A had breached the contract by not transferring the AAA franchise to NBI.

The First Circuit then proceeded to address the question whether NBI was entitled to a remedy of damages or specific performance. The Court held that "[t]his Court can order specific performance even though the District Court did not address the issue. *See Laclede Gas Co. v.*

(Continued from previous page)

are only susceptible of one meaning. It is Triple-A's view that Maine law provides that contract language is always to be interpreted in light of the surrounding facts and circumstances, including the party's knowledge of and understanding of industry and trade practices. *Whit Shaw Assoc. v. Wardwell,* 494 A.2d 1385, 1387 (Me. 1985); *Hutchins v. Lewis,* 104 Me. 27, 28, 70 A. 293 (1908). Further, Maine law bars the consideration of extrinsic evidence only when contract language is completely unambiguous, *T-M Oil Co., Inc. v. Pasquale,* 388 A.2d 82, 84 (Me. 1978); *Lewiston Fire Ass'n. v. City of Lewiston,* 354 A.2d 154, 163 (Me. 1976), and also recognizes a distinction between latent and patent ambiguity. *Sargent v. Coolidge,* 399 A.2d 1333 (Me. 1979); *Gallagher v. Black,* 44 Me. (2 Ludden) 99, 103 (Me. 1857).

It is Triple-A's view that the First Circuit's opinion is in conflict with Maine law as expressed by the State of Maine's highest court. Triple-A does not press this point here only because Supreme Court Rule 17 has dropped the existence of such a conflict as a factor for consideration in granting petitions for certiorari.

Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975)." 832 F.2d at 222.[5]

Because Triple-A believes that the First Circuit usurped the role of the District Court by ordering equitable relief in the absence of any consideration of the issue itself or the underlying facts relevant to that issue by the District Court, it now petitions this Court for a Writ of Certiorari and a reversal of the First Circuit's order of specific performance.

REASONS FOR GRANTING THE WRIT

THE FIRST CIRCUIT'S ORDER OF SPECIFIC PERFORMANCE WAS UNJUSTIFIED BY EITHER THE ABSENCE OF DISPUTED FACTUAL ISSUES OR BY EXTENUATING CIRCUMSTANCES, AND THUS CONSTITUTED AN EXERCISE OF DISCRETION BELONGING IN THE FIRST INSTANCE TO THE TRIAL COURT UNDER BOTH FEDERAL COMMON AND MAINE LAW, AN EXERCISE FOR WHICH AN APPELLATE COURT IS ILL-SUITED AND WHICH IS DISRUPTIVE TO THE PROPER FUNCTIONING OF THE FEDERAL COURT SYSTEM.

After a five-day trial and the introduction of voluminous documentary evidence, including a number of deposition transcripts, the District Court held that the contract at issue in this matter had terminated under its own terms.

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[5] On November 24, 1987, the United States District Court for the District of Maine issued an Order Entering Judgment on Remand. *See*, p. App. 132, *infra*, ordering, *inter alia*, that Triple-A specifically perform the September 3 and September 4 Agreements. On January 4, 1988, the Court issued an Order Supplementing Order Entering Judgment on Remand, in which it ordered a closing on January 19, 1988. *See* p. App. 137, *infra*. NBI is, however, aware of the pendency of this filing.

In view of its conclusion, the Court held that NBI had neither repudiated nor breached its obligations to convey the AA franchise as claimed in Counts I and II of Triple-A's Complaint, and further held that "there is no need to discuss NBI's defenses or counterclaims or to determine the extent of the financial injury, *if any*, suffered by either Plaintiffs or NBI." 655 F.Supp. at 538 (emphasis added). Thus, while both Triple-A and NBI had presented testimony on the question of damages with respect to their respective claims and counterclaims, and there had been some evidence submitted bearing on the questions of the comparability or lack thereof of AA and AAA franchises, the District Court found it unnecessary to make any findings whatsoever with respect to that evidence.[6] There is no indication in the District Court's opinion about the court's assessment of credibility of witnesses on the question of damages, and what weight it would have placed on the conflicting testimony on the damages question.

Notwithstanding the District Court's failure to decide any factual issues relevant to damages on NBI's counter claim, after reversing the District Court's holding that the contract had terminated by its own terms, the First Circuit held that Triple-A was "contractually obligated to transfer the AAA franchise to NBI in accord with the terms of the contract," 832 F.2d at 222, and proceeded to address the question of the remedy to which NBI was entitled. The court's discussion of Maine law on the question

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[6] The Court did address Triple-A's damage claims as against the International League, 655 F.Supp. at 544-45, but concluded that those damages were highly uncertain, contingent, and speculative, and awarded only injunctive relief.

of specific performance generally, and whether Maine law would consider a decree of specific performance appropriate with respect to the sale of a franchise, was extensive, 832 F.2d at 222-25, but it cited only one case as authority for its statement that "[t]his Court can order specific performance even though the District Court did not address the issue. *See Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 38-40 (8th Cir. 1975)." 832 F.2d at 222.

Laclede does not stand for so broad a proposition, however. *Laclede* was a diversity action in which Missouri law controlled. The *Laclede* court reversed the district court on the question whether there was a contract, and noted that the district court had not dealt with the question whether to grant specific performance. 522 F.2d at 38. The court noted that "the determination of whether or not to order specific performance of the contract lies within the sound discretion of the trial court." *Id.* at 38-39. The court went on to point out, however, that under Missouri law, "when certain equitable rules have been met and the contract is fair and plain 'specific performance goes as a matter of right.'" *Id.* at 39, *quoting Miller v. Coffeen*, 365 Mo. 204, 280 S.W. 2d 100, 102 (1955). The court further pointed out that it had carefully reviewed the record and was satisfied that the matter at issue "falls within that category in which specific performance should be ordered as a matter of right." 522 F.2d at 39.

Maine law is directly to the contrary. The Maine Law Court has held that

> [a] decree of specific performance can never be claimed as a matter of right. A bill in equity for this purpose is always addressed to the sound discretion

of the court under the rules and principles of equity jurisdiction.

Fortin v. Wilensky, 142 Me. 372, 379, 53 A.2d 266, 269 (Me. 1947). Such a rule reflects the traditional common law view. "This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances in each particular case." *Willard v. Tayloe,* 75 U.S. (8 Wall.) 557, 565, 19 L.Ed. 501 (1869). *See also Walker Transportation Co., Inc. v. Neylon,* 396 F.2d 558 (8th Cir. 1968); *Drayson v. Height,* 189 F.2d 658 (D.C.Cir. 1951). Thus, *Laclede,* which hinged on a peculiarity of Missouri law, is simply inapplicable to this case, and does not provide support for the First Circuit's order of specific performance.

In this matter, the District Court never exercised its discretion on the question of specific performance because the question never arose until the First Circuit reversed. Even where a district court *has* exercised its discretion but has failed to exercise that discretion properly, the ordinary remedy is to remand the case for a further exercise of discretion. *Duran v. Elrod,* 760 F.2d 756, 762-63 (7th Cir. 1985). In *Duran,* the Seventh Circuit had been asked to modify an equitable decree, and the court noted that even where a party's argument for such a modification was "compelling," the court was not justified in reversing the district court unless the district court had committed an abuse of discretion. *Id.* The Seventh Circuit found reversible error in the District Court's denial of the request to modify its decree, but even under those circumstances noted that only "the exigencies of time force us to sub-

stitute our own view without giving [the district court] an opportunity for reconsideration." 760 F.2d at 763.

In the instant matter, the First Circuit did not hold that the District Court had committed an abuse of discretion, and it improperly failed to remand to the District Court for determination whether damages or specific performance was the proper remedy.

After summarizing Maine law on the question of specific performance, and predicting that Maine law would extend the remedy of specific performance to the sale of a franchise,[7] the Court proceeded to make what amounts to findings of fact that it then determined "bring [the case] well within the ambit of the rules requiring specific performance." 832 F.2d at 224-25. An appellate court may decide a factual issue without remand if "the record itself sufficiently informs the court of the basis for the trial court's decision on the material issue, . . . or when the

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[7] Triple-A notes that in all the cases cited by the court in its discussion of the application of the doctrine of specific performance to the sale of franchises, the disappointed Plaintiff/purchaser did not already have a franchise, and was thus excluded from engaging in its prospective business by the breach of the contract of sale. *See* discussion at 832 F.2d at 223, and cases cited therein. In this case, NBI already owned and operated a baseball team, and simply sought to substitute the operation of a AAA team for the operation of a AA team. Under such circumstances, it cannot be stated as a matter of law that a AA team is "no suitable substitute," Restatement (Second) of Contracts § 360(b), Comment c (1981), *cited* 832 F.2d at 223, for a AAA team. Indeed, Triple-A *desired* to substitute a AA team for its AAA team as found by the District Court. 655 F.Supp. at 536. A determination that a AA team is no suitable substitute for a AAA team is precisely the sort of finding of fact that is appropriate for the District Court. A Circuit Court, not having heard the testimony and assessed credibility of the witnesses, is ill-suited to determine such an issue.

facts with respect to a particular issue are undisputed." *Talley v. United States Postal Service,* 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 2155 (1984) (internal quotations and citations omitted). *See also LaRoche v. United States,* 779 F.2d 1372, 1377 (8th Cir. 1985), and *Seattle Box Co., Inc. v. Industrial Crating and Packing, Inc.,* 756 F.2d 1574, 1578 (Fed.Cir. 1985), *both citing Pullman-Standard v. Swint,* 456 U.S. 273, 291-92, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982). The normal practice where there are inadequate findings to explain a district court's reasoning on an issue *reached* by the district court, much less an issue not reached by the district court, is to remand unless " 'the record leaves no question as to the decision that must result from a remand.' " *Seattle Box Co.,* 756 F.2d at 1578, *quoting Baginsky v. United States,* 697 F.2d 1070, 1074 (Fed.Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 423, 78 L.Ed. 2d 358 (1983). The record could not have informed the First Circuit of the basis for the district court's decision on the issues material to the First Circuit's order of specific performance, since the district court made no such decisions.

The First Circuit did not expressly state that the record permitted only one resolution of the numerous factual issues necessary to support a determination that specific performance was the appropriate remedy on NBI's counterclaim. In its brief to the First Circuit, Triple-A argued strenuously that there were many factual issues that the District Court had not resolved that had to be resolved prior to an order of specific performance, and that NBI itself had presented extensive evidence in the form of testimony from Bill Terlecky, NBI's General Manager and expert witness, quantifying the claimed difference in ex-

pected income and other factors should it retain its AA team and not acquire the AAA team. Triple-A further pointed out that NBI would be better able to quantify the difference between the two after the 1987 baseball season, because NBI operated a AA team in Williamsport, Pennsylvania, where it would have operated the AAA team during that season.

The roles of the Federal courts at their various levels have been carefully crafted by case law and rule during the course of years. There is simply no justification for the First Circuit's usurpation of the District Court's role on remand. There is no indication that the District Court could not have made factual findings, including taking further evidence if necessary, and delivered an opinion on the proper remedy expeditiously. The 1987 baseball season was over when the Court rendered its decision, and NBI itself took the position during trial that preparations for a baseball season could be commenced as late as January or February prior to the season without causing damage to a team. There was no intimation that the District Court would refuse to apply the law as stated by the First Circuit. Finally, numerous factual issues had to be resolved in order to justify an order of specific performance, none of which was so clear on the basis of the voluminous record and conflicting testimony that the record permitted only one resolution of all such issue. Under such circumstances, the First Circuit's decision to decide the remedy question not only worked an injustice against Triple-A, which believed and continues to believe that specific performance is not appropriate, but also sets a precedent which, left unaltered, would permit Federal appellate

courts to decide factual issues *de novo* when such issues have never even been addressed by the trial court. The consequences of such a precedent extend far beyond the particular circumstances in this case, and could disrupt the efficient working of the Federal courts.

CONCLUSION

For the foregoing reasons, this Court should exercise its supervisory powers and issue a Writ of Certiorari to review the judgment and opinion of the United States First Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1239

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellees,

v.

NORTHEASTERN BASEBALL, INC.,

Defendant, Appellant.

No. 87-1266

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellants,

v.

NORTHEASTERN BASEBALL, INC.,

Defendant, Appellee.

No. 87-1307

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellees,

v.

NORTHEASTERN BASEBALL, INC., ET AL.,

Defendants, Appellees.

INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS,

Defendant, Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before
Bownes, Torruella and Selya,
Circuit Judges.

Thomas B. Wheatley with whom *John A. Hobson, Perkins, Thompson, Hinckley & Keddy, John F. Wendel* and *Wendel & Chritton, Chartered* were on brief for Northeastern Baseball, Inc. and Multi Purpose Stadium Authority for Lackawanna County.

Keith A. Powers with whom *Michael Kaplan* and *Preti, Flaherty, Beliveau & Pachios* were on brief for Triple-A Baseball Club Associates, Triple-A Baseball Club of Maine, Inc. and Jordan Kobritz.

Frank A. Ray with whom *Frank A. Ray Co., L.P.A.* was on brief for International League of Professional Baseball Clubs.

October 13, 1987

BOWNES, *Circuit Judge.* All parties have appealed in this diversity contract case which was tried without a jury by the district court.

The plaintiffs are: Triple-A Baseball Club, a Maine limited partnership; Jordan Kobritz, general partner of the limited partnership; and Triple-A Baseball Club of Maine, Inc., another general partner of the limited partnership, all of whose stock is owned by Kobritz. Plaintiffs will be referred to as "the partnership" and/or "Kobritz," as the reference requires.

Defendants are Northeastern Baseball, Inc. (NBI), a Pennsylvania nonprofit corporation; the Multi-Purpose Stadium Authority (MPSA) of Lackawanna County, Pennsylvania, a county and state entity; and the International League of Professional Baseball Clubs, Inc., a nonprofit corporation organized under the laws of the State of Virginia. The International League is also a third-party plaintiff.

The focus of the case is the interpretation of a written contract dated September 3, 1986, between the three plaintiffs and NBI. The district court made extensive and detailed findings of fact and rulings of law. *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.*, 655 F. Supp. 513 (D. Me. 1987). The crux of the court's opinion is its ruling that a key phrase in the contract was ambiguous and consequent nullification of the contract based on what it found from extrinsic evidence was the intent of the parties. We think it was error and hold that the plaintiffs and NBI are bound by the terms of the contract.

HOW THE GAME WAS PLAYED

Before we step onto the playing field for this contract case, a little baseball background is necessary. Baseball is organized into Major Leagues and Minor Leagues. There are two leagues within Major League Baseball, the American League and the National League, containing a total of twenty-six Major League teams.

The Minor Leagues of Professional Baseball are organized as members under the National Association of Professional Baseball Leagues. The Minor Leagues have entered into the National Association Agreement with the Major Leagues. The Minor Leagues are divided into four classifications, Triple-A, Double-A, Single-A, and Rookie Leagues.

There are three Triple-A Leagues containing a total of twenty-six teams, one for each Major League team. One of the Triple-A Leagues is the International League, which is governed by a constitution, bylaws and rules.

There are three Double-A Leagues, also containing a total of twenty-six teams, one for each Major League team. One of the Double-A Leagues is the Eastern League, which is governed by bylaws, rules and regulations.

Since the goal of most Minor League players is to play in the Major Leagues and since the Major League teams obtain most of their players from the Minor Leagues, the Major League teams have player development contracts with Triple-A and Double-A teams. The game now begins.

John McGee was a man with a self-imposed mission. Indeed, it could be described as an obsession. He wanted

to bring Triple-A Baseball to Scranton, Pennsylvania. But there were two problems. One, Scranton did not have a Triple-A franchise, that is, it did not have a right to have a Triple-A team play there. Such a franchise could be granted only by permission of the International League and the National Association of Professional Professional Baseball Leagues, the governing body of Minor League baseball.[1] McGee's second problem was that Scranton did not have a stadium suitable for Triple-A baseball. McGee, however, was not deterred. He first convinced the county commissioners of Lackawanna County, in which Scranton is located, that a municipal corporation ought to be formed to build a stadium that would meet Triple-A requirements; MPSA was formed and McGee became its legal advisor. At about the same time, McGee and several associates from the Scranton area purchased the Double-A franchise of the Waterbury, Connecticut, Indians that was for sale. It was McGee's intent, and he so informed the directors of the Eastern League who had to approve the sale, to operate the Indians in Waterbury in 1985 and 1986 and move the team to Scranton in 1987, when the new stadium was completed. McGee made no bones about his ultimate goal of operating a Triple-A team in Scranton. NBI was formed and became the owner of the Waterbury Indians.

In his quest for a Triple-A franchise, McGee, on June 18, 1986, approached Kobritz who, through the partner-

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1. For those not familiar with the Great American Game, we point out that professional baseball has had a long-standing exemption from the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

ship, was the major owner of the Maine Guides, a Triple-A team that played in Old Orchard Beach, Maine. McGee offered to buy the Triple-A franchise and Kobritz indicated an interest in selling. Negotiations continued through the summer. On July 30, McGee sent to Kobritz two contract drafts. One draft provided that NBI would buy the Triple-A franchise for $2.4 million, the other that Kobritz individually would buy NBI's Double-A franchise for $400,000. A check for $100,000 accompanied the drafts. Kobritz did not sign the drafts; he kept the check but did not deposit it. On August 20, Kobritz sent a proposed draft contract to McGee. Kobritz' proposal was more complicated than McGee's because he had some reluctant partners to deal with. In effect, Kobritz proposed that NBI pay $1.2 million to the limited partnership and $800,000 to the general partners. Kobritz's proposal also made the transfer of the Triple-A franchise to NBI contingent upon the transfer to the partnership of NBI's Double-A franchise.

On September 3, 1986, the partnership and NBI signed a contract, A in Appendix, which was drafted in final form by Kobritz' attorney. It provides as follows. The parnership agrees to sell its Triple-A franchise to NBI for $2.4 million. NBI agrees to sell its Double-A franchise to the partnership for $400,000. Paragraph 5 of the contract states: "In the event that the Eastern League of Professional Baseball Clubs shall refuse to approve the sale of the Double-A Baseball Franchise to Triple-A, then this Agreement shall continue in full force and effect with the following modifications: . . . ." The modifications made the purchase price of the Triple-A franchise $2 million payable by a deposit of

$100,000 (which Kobritz already had) and $1.9 million at the closing. Paragraphs 6, 7, and 8 made the agreement subject to the approval on or before September 11, 1986, of the board of directors of NBI, the limited partners of the partnership, and the International League. All three approvals were obtained prior to September 11. Paragraph 9 states: "The transfer of the Double-A franchise is subject to the approval of the Eastern League of Professional Baseball Clubs." Paragraph 10 makes the approvals required under paragraphs 6, 7, and 8 "conditions precedent" and restates them in subparagraphs A, B, and C. It is to be noted here that, in contrast to paragraph 10, paragraph 9 does not make the approval of the sale of the Double-A franchise a condition precedent of the contract. Paragraph 11 set the closing for October 21, 1986, at Portland, Maine. Paragraph 12 provides that at the direction of NBI the partnership "shall sign a Player Development Contract with the Major League team selected" by NBI on or before September 14, 1986. On September 9, 1986, the partnership, at NBI's direction, signed a Player Development Contract with the "Phillies" of the National League, a Major League team. Paragraph 13 imposed the obligation to sign a player development contract with the Major League team selected by the partnership on NBI. This was not done because, on September 10, 1986, NBI transferred its Double-A franchise to the Eastern League.

On the same day, September 3, and at practically the same time, Kobritz individually and NBI entered into a side agreement. Kobritz handwrote the side agreement while his attorney was making final changes to the main contract. It provided: Both parties agreed "to use

their best efforts to obtain Eastern League approval" of the purchase by the partnership of NBI's Double-A franchise. It was then provided that "if even after using their best efforts the Eastern League failed to approve such sale," the parties do hereby agree as follows:

> 1. Seller [NBI] agrees to sell to Buyer [Kobritz] and Buyer agrees to purchase from Seller the Double-A franchise currently owned by Seller for the purchase price of Five Hundred Thousand Dollars ($500,000.00) payable as follows:
>
> > Fifty Thousand Dollars ($50,000.00) per year for ten years commencing on September 30, 1987, and continuing on each September 30th thereafter to and including September 30, 1996.
>
> 2. Seller and Buyer shall enter into a consulting agreement for a period of ten years, whereby Buyer shall provide services to Seller for such ten year period. Seller shall pay Buyer Fifty Thousand Dollars ($50,000.00) per year commencing on September 30, 1987 and continuing on each September 30th thereafter to and including September 30, 1996.

The September 3 handwritten side agreement was superseded by a tyepwritten agreement between the same two parties, dated and executed on September 4. B in Appendix. It contains the same provisions in the same language outlined above but has three additional paragraphs. Paragraph 3 provides:

> In the event that the Eastern League denies approval both to the sale of the Double-A franchise to Triple-A Baseball Club Associates and the sale of the Double-A franchise to Buyer, Seller will reduce the amount of Buyer's consulting agreement by the amount of indemnification damages if Seller is required to pay indemnification damages to the Eastern

> League in connection with its acquisition of the International League Team. However, in no event shall the amount pursuant to the consulting agreement be reduced below Four Hundred Thousand Dollars ($400,000.00), payable under the same terms as set forth in paragraph 2 above, the first payment commencing on September 30, 1987.

Paragraph 4 makes the agreement contingent upon NBI's acquisition of the Triple-A franchise pursuant to the terms of the main contract. Paragraph 5 contains the superseding provision.

After being advised by McGee of the proposed sale of the Double-A franchise by NBI to the partnership, the Eastern League took the position that it had territorial franchise rights[2] to the Scranton area and refused to approve the sale. The League insisted that it would not give up its territorial claim to the Scranton area unless NBI transferred its Double-A franchise to the League. As already noted, this transfer was made on September 10, 1986. McGee and his attorney appeared in Portland on the date of the closing prepared to pay Kobritz $1.9 million. He was informed by Kobritz and his attorney that the sale of the Triple-A franchise would not be made. The game then moved to the federal district court.

THE LINEUP

P'laintiffs' Claims

On October 21, the day following the aborted closing, plaintiffs filed suit in federal district court against NBI

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2. A franchise territory consists of the municipality in which the team is located plus an area of ten miles in all directions from the municipality's limits.

asking for a declaratory judgment holding that the contract "has terminated under its own terms because of the failure of certain required conditions to occur . . . ." On November 7, 1986, a complaint was filed by plaintiffs against the International League seeking injunctive and declaratory relief. Amended complaints against both defendants were filed on December 30, 1986.

The action against NBI has four counts. Count I seeks a million dollars in damages for NBI's alleged repudiation of the contract. Count II alleges breach of contract and damages of one million dollars. As far as we can tell, Counts I and II are essentially the same. Count III alleges that the failure of NBI to convey the Double-A team to the partnership, the failure of NBI to seek the Eastern League's approval of the transfer in good faith, and the failure of the Eastern League to take the proper action to approve or disapprove the sale of the Double-A team resulted in the termination of the contract "in accordance with its own terms"; no damages were sought under this count. Count IV alleged conversion by NBI of the plaintiffs' Triple-A franchise; the acts constituting conversion were: improperly stating and acting as though NBI possessed the Triple-A franchise and exercising rights which flow from the ownership of such franchise despite the fact that no transfer of the franchise had occurred. Consequential damages of four million dollars and an injunction were sought if the partnership's Triple-A team was unable to participate in the 1987 baseball season. We take judicial notice of the fact that this contingency has not occurred. Count V alleged breach of the September 4 side agreement, damages of two million dolllars were sought.

Plaintiffs' action against the International League states five counts: I, violation of duty to operate the

International League in accordance with its constitution, only injunctive relief was sought; II, oppression of and breach of fiduciary duty to a League member, four million dollars in damages were sought; III, wrongful removal of Kobritz as a director of the International League, declaratory and injunctive relief was sought; IV, tortious interference with contractual relations, damages were contingent on the partnership's Triple-A team being unable to participate in the 1987 baseball season, which did not occur; V, conversion of plaintiff's Triple-A franchise by the International League in collusion with NBI, four million dollars in damages and injunctive relief weres ought.

On January 22, 1987, plaintiffs brought a complaint against MPSA alleging conversion and fraudulent transfer of the partnership's Triple-A franchise.

Defendants' Counterclaims

NBI's counterclaim alleges: that it did not repudiate or breach the contract and asked that the Triple-A franchise be conveyed in accord with the terms of the contract (Count I); that the plaintiffs breached the contract, specific performance or damages "in excess of $10,000 were sought (Count II).

The International League brought a counterclaim and a third-party complaint against NBI and MPSA alleging four causes of action. The first sought declaratory relief that NBI and MPSA hold the League harmless from any judgment or award in favor of the plaintiffs against it. The second sought declaratory relief to the effect that any dispute between the partnership and NBI as to the ownership of the Triple-A franchise "is to be exclusively

investigated and adjudicated by League, all to the exclusion of judicial intervention." The third alleged that the partnership, and/or NBI, and/or MPSA had intentionally and/or negligently interfered in the League's business relationships. Monetary damages in an unspecified amount were sought. In its fourth cause of action, the League claimed that the partnership, and/or NBI, and/or MPSA breached an express or implied contract by failing to comply with the League's constitution; damages of not less than $10,000 were sought.

THE SEPTEMBER 3 CONTRACT

The Findings and Rulings of the District Court

The district court first ruled that Maine Law "imposes a general duty of good faith on the parties to a contract." 655 F. Supp. at 536. We think this was correct. *See Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 12-15 (1st Cir. 1987). The court then found that NBI "acted in good faith throughout the transaction with the Limited Partnership." 655 F. Supp. at 537. Based on our review of the record, we agree. We now turn to the court's interpretation of the terms of the contract.

During the trial, the court admitted, *de bene*, parol and documentary evidence bearing on the intent of Kobritz and McGee as to the contract of September 3 between the partnership and NBI. The court held:

> The Court agrees with Plaintiffs that the September 3 main agreement is ambiguous. That agreement provided that if "the Eastern League . . . shall refuse to approve the sale" of the Double-A franchise to the Limited Partnership, the agreement remained in full force and effect with the modification that the

> price of the Triple-A franchise would be reduced from $2.4 million to $2 million. But nowhere does the agreement define the term "refuse to approve the sale"; the parties clearly attach different meanings to this term.

655 F. Supp. at 535. The court then ruled that the evidence admitted *de bene* was "admissible to show the intent of the parties. *Id.* at 536.

Based on its consideration of the extrinsic evidence, the court found that the "only possible basis contemplated by either party for the Eastern League's refusal to approve the transfer was the existence of dissent among Kobritz's limited partners." It then went on to find that "[n]either Kobritz nor McGee had any reason to suspect that the Eastern League would refuse to consider the transfer" and that the Eastern League had refused to approve the transfer" and that the Eastern League had refused to approve the transfer "without formal consideration of the merits of the transfer." *Id.* at 537. The court further found that "an implied-in-fact condition precedent of the September 3 agreement was that the Eastern League would either approve or refuse *on the merits* to approve the transfer of the Double-A franchise to the Limited Partnership." (Emphasis added.) The court then held: "Because this implied-in-fact condition precedent did not occur, the agreement terminated by its own terms and the Limited Partnership must return the $100,000 deposit with interest accrued thereon in accordance with paragraph 14 of the agreement." *Id.* at 538 (footnote omitted).

Although by rewriting the contract between the parties, the court may have arrived at what it considered a

just result, we think it violated the basic principles of contract law.

The Controlling Rules

The parties have stipulated that Maine law controls. In the area of contract law that concerns us, Maine law is similar to that of most jurisdictions. Under Maine law, deciding whether a contract clause is ambiguous is a question of law, *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1387 (Me. 1983), and, thus, the trial court may be reversed if its decision is erroneous, *Hare v. Lumbermens Mutual Casualty Co.*, 471 A.2d 1041, 1044 (Me. 1984). The interpretation of an unambiguous contract is also a matter of law. *Century Homes, Inc. v. Plaisted*, 412 A.2d 389, 391 (Me. 1980) (" 'The construction of an unambiguous written contract is a question of law for the Court. An agreement, complete in itself, speaks for itself. Its meaning, the promises it makes and the duties or obligations it imposes, are questions of law for the court.' ") (quoting *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 178)) (citations omitted); *Soper v. St. Regis Paper Co.*, 411 A.2d 1004, 1006 (Me. 1980); *cf. United Truck and Bus Service Company v. Piggott*, 543 F.2d 949, 950 (1st Cir. 1976) ("If the district court had only construed the written contract itself, its conclusion would be freely reviewable.") (citations omitted).

The Maine Supreme Judicial Court has described the ambiguity analysis as follows:

> The issue of whether contract language is ambiguous is a question of law for the Court. The interpretation of an unambiguous written contract is a question of law for the Court; the interpretation of ambiguous

> language is a question for the factfinder. The interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence. Once an ambiguity is found then extrinsic evidence may be admitted and considered to show the intention of the parties. Contract language is ambiguous when it is reasonably susceptible of different interpretations.

Portland Valve, 460 A.2d at 1387 (citations omitted). *See also City of Augusta v. Quirion,* 436 A.2d 388, 392 (Me. 1981). Extrinsic evidence should be resorted to only "when the contract language is ambiguous and that ambiguity does not disappear when examined in the context of the other provisions in the instrument." *T-M Oil Co., Inc. v. Pasquale,* 388 A.2d 82, 85 (Me. 1978). And, "[a] contract need not negate every possible construction of its terms in order to be unambiguous." *Waxler v. Waxler,* 458 A.2d 1219, 1224 (Me. 1983).

Maine, like most jurisdictions, disapproves of courts rewriting contracts.

> Moreover, courts should not rewrite contracts, particularly agreements between two corporations acting at arms length. "We are skeptical, too, that so important a feature [as exclusive selling rights] of the franchise agreement would be so infelicitously phrased by those as astute as businessmen generally are." In the absence of any express language or any ambiguous language, which would permit the admission of relevant extrinsic evidence, reasonably indicating such a restrictive intent, the court will not lightly import meaning into a contract.

Portland Valve, 460 A.2d at 1388 (quoting *Lee v. Flintkote Co.,* 593 F.2d 1275, 1282 (D.C. Cir. 1979) (citations omitted)). *See also Aroostook Valley Railroad Co. v. Bangor & Aroostook Railroad Co.,* 455 A.2d 431, 433 (Me. 1983). We have recently commented on this very point:

> "It is no appropriate part of judicial business to rewrite contracts freely entered into between sophisticated business entities." *RCI Northeast Services,* [822 F.2d at 205]. When the transaction is commercial, the principals practiced and represented by counsel, and the contract itself reasonably clear, it is far wiser for a court to honor the parties' words than to imply other and further promises out of thin air. We quite agree with Judge Learned Hand that, in business dealings, "it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." *James Baird Co. v. Gimbel Bros., Inc.,* 64 F.2d 344, 346 (2d Cir. 1933).

Mathewson Corp. v. Allied Marine Industries, Inc., No. 86-2089, slip op. at 11-12 (1st Cir. Sept. 1, 1987). These principles inform our analysis of the contract.

Applying the Rules

It is to be noted first that the contract was negotiated between two men who were both lawyers and accountants and had prior experience with the sale and purchase of Minor League baseball franchises. Neither Kobritz, who was the prime mover for the plaintiffs, nor John McGee, president of NBI, who called the shots for the defendant, were rookies. Both knew how to keep score.

Paragraph 5 is the hinge on which this case swings. It provides: "5. In the event that the Eastern League of Professional Baseball Clubs *shall refuse to approve the*

sale of the Double-A Baseball Franchise to Triple-A, then this Agreement shall continue in full force and effect with the following modifications: . . . ." (Emphasis added.) We do not find the phrase "refuse to approve the sale" ambiguous. Unlike the district court, we think the term is clear and does not need to be defined. The words "refuse to approve" are only susceptible of one meaning; they mean what they say. Examining the clause within the four corners of the contract confirms its unambiguity. Paragraph 9 makes the transfer of the Double-A franchise "subject to the approval" of the Eastern League. This is but a variation on "refuse to approve." The language, as written, does not qualify or condition the grounds upon which the Eastern League could "refuse to approve" the sale; nor does it set up any formal requirements as to the form or procedure for such a refusal. The term is absolute and unequivocal—if the Eastern League did not approve the sale, the contract was to go ahead, but with altered terms.

The district court held that the parties attached different meanings to the term "refuse to approve." It then found, based on extrinsic evidence that the term had to be interpreted to mean there was an implied-in-fact condition precedent that the refusal had to be "on the merits." With due respect, we think that the phrase "on the merits" not only changes the sparse plain language of the contract, but is itself ambiguous. We cannot help but conclude that the court's interpretation of the contract was influenced by the *de bene* evidence which, because of the plain meaning of the contract, should have been excluded.

The plaintiffs argue strenuously that the contract was essentially a swap of franchises: "that the AA team was

the essential element of consideration provided for Triple-A's [the partnership's] conveyance of the AAA franchise to NBI." Brief at 26. This contention is completely refuted not only by the terms of the contract but by documents that preceded, accompanied and followed its execution. On August 20, Kobritz sent a proposed draft of a contract to McGee. Paragraph 12 of this proposed, but not accepted, draft states: "12. The transfer of the Triple-A Baseball franchise is contingent upon receipt of the Double-A Baseball franchise in accordance with the terms and conditions of this Agreement." The executed contract contains no such provision. It does state that "the transfer of the Double-A franchise is subject to the approval of the Eastern League," but the transfer of the Triple-A franchise was not made contingent upon such approval. Paragraph 8, in contrast, makes the contract "contingent upon the approval" of the International League. Nor was the approval of the Eastern League made a condition precedent, as were the three other occurrences set forth in paragraph 10:

> 10. The following conditions precedent shall be required:
>
> A. The approval of the Board of Directors of Double-A which approval shall be obtained before September 11, 1986;
>
> B. Approval by the International League of Professional Baseball Clubs on or before September 11, 1986;
>
> C. The approval of the Limited Partners of Triple-A on or before September 11, 1986.

Kobritz clearly knew how and when to use the terms "contingent" and "condition precedent." We can only

conclude that the omission of either from paragraph 9 of the contract was intentional.

The September 3 side agreement which was executed practically simultaneously with the main contract further refutes the partnership's "swap" argument. Kobritz wrote this agreement himself. He explicitly recognized that Eastern League approval might not be obtained for the transfer of the Double-A franchise but, as in the main contract, this would not be fatal to NBI's purchase of the Triple-A franchise.

The September 4 side agreement is a further embodiment of the parties' recognition that a franchise "swap" might not occur and was not an essential ingredient of the main contract. It provided that if the Eastern League failed to approve the transfer of the Double-A franchise to either the partnership or Kobritz, Kobritz was to re-receive a consulting fee of not less than $400,000. Kobritz did not draft this provision. He did, however, execute the September 4 side agreement after learning that the scheduled September 6 Eastern League meeting to consider the transfer of the Double-A franchise had been cancelled. Kobritz, therefore, must have been aware that League approval was not certain.

Money, not an exchange of franchises, was the motivation for the sale of the Triple-A franchise to NBI. Under the main contract, the partnership was to be paid two million dollars; under the September 4 side agreement, which was assigned to the partnership by Kobritz, it stood to receive an additional $500,000 over a ten-year period.

The final nail in the coffin of plaintiffs' swap-of-franchise argument is a provision in the document soliciting

partnership vote approval of the September 3 contract. This document, dated September 5, was drawn up by Kobritz and specifically provides in paragraph 4: "4. The Limited Partners acknowledge that the sale of the Triple-A Baseball Franchise in the International League of Professional Baseball Clubs owned by Triple-A Baseball Club Associates *is not contingent upon the acquisition of the Double-A Baseball Franchise.*" (Emphasis added.) There was no swap of franchises provided for in the contract nor did the parties intend that there be one.

The Eastern League refused to approve the transfer of the Double-A franchise. In light of the plain language of the contract, its reasons are irrelevant. The partnership and Kobritz were contractually obligated to transfer the Triple-A franchise to NBI in accord with the terms of the contract.

The next question is the remedy to which NBI is entitled, damages or specific performance. This court can order specific performance even though the district court did not address the issue. *See Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 38-40 (8th Cir. 1975). As with the other legal issues, the law of Maine on specific performance versus damages is like that of most jurisdictions. The granting of specific performance is a matter of judicial discretion. *See, e.g., Dunham v. Hogan,* 56 A.2d 550, 551 (Me. 1948); *Fortin v. Wilensky,* 53 A.2d 266, 269 (Me. 1947); *Jenkins Petroleum Process Co. v. Sinclair Refining Co.*, 32 F.2d 247, 249 (D. Me. 1928), *aff'd as modified,* 32 F.2d 252 (1st Cir. 1929). Specific performance will not be granted unless the terms of the contract are clear enough to enable a court to fashion an appropriate order.

See, e.g., Fortin v. Wilensky, 53 A.2d at 269; *Jenkins Petroleum Process Co.,* 32 F.2d at 257 (1st Cir.). Specific performance will not be granted where there exists an adequate remedy at law. *See, e.g., McIntyre v. Plummer Associates,* 375 A.2d 1083, 1084 (Me. 1977). The party seeking specific performance has the burden of showing that it is warranted. *Cf. Oullette v. Boldus,* 440 A.2d 1042, 1046 (Me. 1982) (party seeking specific performance has burden of showing a meeting of the minds); *Dutch v. Scribner,* 118 A.2d 887, 888 (Me. 1955) (party seeking specific performance has burden of showing fraud or promise). The party seeking specific performance must show an attempt to tender its own full performance, *see, e.g., Cobb v. Cougle,* 351 A.2d 110, 113 (Me. 1976), unless such tender would be futile, *see A. L. Brown Construction Co., Inc. v. McGuire,* 495 A.2d 794, 797-8 (Me. 1985). Contracts for the sale of realty may be specifically enforced. *Forbes v. Wells Beach Casino, Inc.,* 307 A.2d 210, 220 (Me. 1973), *appeal after remand,* 409 A.2d 646 (Me. 1979). Maine also allows specific performance on contracts for personalty, in certain circumstances. *Northeast Investment Co., Inc. v. Leisure Living Communities, Inc.,* 351 A.2d 845, 855-56 (Me. 1976) (specific performance was appropriate to enforce an oral contract to purchase stock, where the stock had no readily ascertainable market value, was not easily obtainable elsewhere, and was of special interest to the buyer).

We have been unable to find any Maine case deciding whether specific performance is appropriate with respect to the sale of a franchise. The few courts that have addressed this issue have all decided that specific performance was appropriate. *See Specific Performance of Agree-*

ment for Sale of Private Franchise, 82 A.L.R.3d 1102 (1978).

In *DeBauge Brothers, Inc. v. Whitsitt,* 512 P.2d 487, 489 (Kan. 1973), the Supreme Court of Kansas explained its holding in favor of specific performance:

> Plaintiff had no adequate remedy in money damages since the real and personal properties to be conveyed were unique and were not available to plaintiff from any other source. . . . Franchises are by their very nature unique and exclusive, which is the source of their value to the possessor.

Similarly, a Florida court has stated:

> Sale of businesses including franchises and good will have frequently been the subject of specific enforcement in equity. 49 Am.Jur. 151. Also see Annotation in 152 A.L.R. 4. The reasons advanced decreeing specific enforcement are that franchises and good will of a business or the value of a going business and profits involved cannot be ascertained and the estimation of value would be so indefinite recovery would not furnish a complete and adequate remedy at law. Chamber of Commerce v. Barton, 195 Ark. 274, 112 S.W. 619; Garbar v. Siegel, 194 Misc. 966, 87 N.Y.S. 597.

Hogan v. Norfleet, 113 So.2d 437, 439 (Fla. Dist. Ct. App. 1959). *See also Cochrane v. Szpakowski,* 49 A.2d 692, 694 (Pa. 1946) (sale of restaurant and retail liquor license may be specifically enforced where no suitable substitute exists).

The Restatement (Second) of Contracts (1981) focuses on the adequacy of a remedy at law. Comment c to § 360(b) states:

> There are many situations, however, in which no suitable substitute is obtainable, and others in which its procurement would be unreasonably difficult or inconvenient or would impose serious financial burdens or risks on the injured party. . . . If goods are unique in kind, quality or personal association, the purchase of an equivalent elsewhere may be impracticable, and the buyer's "inability to cover is strong evidence of" the propriety of granting specific performance. Comment 2 to Uniform Commercial Code § 2-716.

5A Corbin on Contracts § 1142 at 117 (1964 & Supp. 1982) is to the same effect:

> Among the factors to be considered in granting a decree for specific performance, the most important seem to be the following: difficulty and uncertainty in determining the amount of damages to be awarded for the defendant's breach; . . . [and] the insufficiency of money damages to obtain the duplicate or the substantial equivalent of the promised performance, either because the subject matter is unique in character and cannot be duplicated or because the obtaining of a substantial equivalent involves difficulty, delay, and inconvenience . . . .

Although the Uniform Commercial Code, adopted by Maine, is not implicated, we think section 2-716 of the Code is a helpful analogy. It states:

"(1) Specific performance may be decreed where the goods are unique or in other proper circumstances." Me. Rev. Stat. Ann. tit. 11, § 2-716(1) (1964). The Maine comment to this section states that it is intended to broaden[] the rule" as compared to its predecessor section in the Uniform Sales Act. The pertinent Uniform Commercial Code comments to this section state:

> 2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept

> of what are "unique" goods is introduced under this section. . . . The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. . . . However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and the inability to cover is strong evidence of "other proper circumstances".

The emphasis on ability to "cover" as a major criterion in deciding the appropriateness of specific performance is also found in the leading case of *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d at 40, where the court ordered specific performance because, in part, "there was uncontradicted expert testimony that Laclede probably could not find another supplier of propane willing to enter into a long-term contract such as the Amoco agreement . . . ."

We think the facts of this case bring it well within the ambit of the rules requiring specific performance. The contract's terms are unambiguous; there is no problem in drafting a clear order. NBI showed its ability and willingness to perform on the closing day and presented convincing evidence of its inability to purchase another Triple-A team. The same factors that impelled specific performance of the sale of corporate stock in *Northeast Invest. Co., Inc. v. Leisure Liv. Com., Inc.*, 351 A.2d at 855-56, are present here: the Triple-A franchise has no readily ascertainable market value, it cannot be easily obtained from other sources, and it is of special interest to NBI.

There can be no doubt that what NBI sought, a Triple-A franchise, was unique. Nor can it be gainsaid that money damages, even if ascertained, could not "obtain the dupli-

cate or the substantial equivalent of the promised performance . . . ." 5A Corbin on Contracts § 1142 at 117. The Restatement, Corbin, the Uniform Commercial Code, and the pertinent case law strongly favor specifically enforcing contracts where the subject of the contract is unique and cannot be duplicated.

Plaintiffs argue: (1) the franchise cases as inapposite because NBI already has a (Double-A) franchise, and (2) damages are quantifiable, hence an adequate remedy at law exists. The first argument is way off base. As this case illustrates, there is a significant difference between a Triple-A and Double-A franchise. Triple-A baseball teams, generally speaking, are superior in quality to Double-A teams and the caliber of the play is consequently higher. Triple-A is the last rung of the baseball ladder leading to the "Majors." The difference between a Triple-A and Double-A franchise is evidenced in this case by the dissent in the partnership over the proposed change from a Triple-A to a Double-A team, by the different stadium requirements of the two leagues, and especially by the dramatic difference in price for the two teams set in the contract. That NBI has a Double-A franchise is simply not relevant. As to damages, Plaintiffs only offer an amount for the year 1987, based on the difference in profits between a Triple-A team and a Double-A team for that year. This formulation does not take into account the difference in location or facilities. Nor do plaintiffs discuss how to measure future lost profits or how to compensate NBI for any added expenses it will incur in obtaining a Triple-A team in the future—assuming one becomes available for purchase.

We have considered plaintiffs' other arguments on this issue and find them without merit.

THE SEPTEMBER 4 SIDE AGREEMENT

The side agreement provides that NBI and Kobritz will use "their best efforts" to obtain Eastern League approval of the purchase by the partnership of NBI's Double-A franchise. Although the side agreement is less than clear and does not particularly describe its relationship to the September 3 main agreement, its net effect appears to be to provide for alternate solutions to the Double-A franchise problem. If, despite NBI's and Kobritz' best efforts, the League failed to approve a sale to the partnership, then Kobritz would undertake to purchase the franchise for $500,000 and NBI would pay Kobritz a consulting fee of $500,000 (paragraphs 1 and 2). The third paragraph then provides that if the Eastern League fails to approve the sale to either the partnership or to Kobritz, Kobritz will, nevertheless, receive a consulting fee of $500,000, payable in $50,000 annual installments.

Since the district court had nullified the September 3 contract because of the failure of an implied condition precedent, it consistently held that this "excused NBI's duty to perform the obligations created by the September 4 side agreement and Plaintiffs cannot recover on that agreement." 655 F. Supp. at 540. The court also found the side agreement ambiguous because "it refers to 'best efforts to obtain Eastern League approval' and to the possibility that 'the Eastern League shall fail to approve the purchase' or may 'den[y] approval.' " *Id.* at 536 Although recognizing that it was not required to do so, the

court, nevertheless, found that "NBI did not use its best efforts to obtain Eastern League approval of the transfer." *Id.* at 540. Despite the fact that, under the agreement, the use of "best efforts" was imposed on both parties, the court made no findings as to what efforts, if any, Kobritz made.

We turn to the case law to determine what requirements "best efforts" imposes. We first note that the "best efforts" standard has been held to be equivalent to that of good faith. In construing a "best effort" obligation under the Maine Uniform Commercial Code, § 2-306, we stated:

> We recognize that the good faith obligation is not the same for a requirements contract and an exclusive dealing contract. Under a requirements contract the obligation is to use good faith in determining requirements. The good faith obligation under an exclusive dealing contract is for the seller to use "best efforts to supply the goods and the buyer to use best efforts to promote the sale." *See Kubik v. J. & R. Foods of Oregon, Inc.*, 282 Or. 179, 577 P.2d 518, 520 (1978).

Gestetner Corporation v. Case Equipment Company, 815 F.2d 806, 811 (1st Cir. 1987). In *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 584 F.2d 1164, 1171 (2d Cir. 1978), the court interpreted the phrase "to use its best efforts to promote worldwide licensing and use" as requiring "active exploitation in good faith." We have been unable to find any case in which a court found, as here, that a party acted in good faith but did not use its best efforts.

The standard, whether it is expressed in terms of good faith or best efforts, cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved. In a case involving the use of "best efforts" to register stock with the Securities and Exchange Commission, the Second Circuit stated: "Due to the nature of the securities business and the vagaries of the SEC, registration can never be *guaranteed*, but in the usual case a 'best efforts' clause is as close to a guarantee of registration as any careful seller is willing to give." *Lipsky v. Commonwealth United Corporation*, 551 F.2d 887, 896 (2d Cir. 1976). The Second Circuit has also held that "best efforts" does not strip the promising party of its "right to give reasonable consideration to its own interests." *Bloor v. Falstaff Brewing Corporation*, 601 F.2d 609, 614 (2d Cir. 1979).

Breach of a "best efforts" duty has been found where the promisor ceased performance, *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 990 (4th Cir. 1981), *cert. denied*, 454 U.S. 1054 (1981), or engaged in a number of misfeasances and nonfeasances. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d at 614. But where the promisor encountered difficult problems in carrying out the terms of the contract, no breach of the "best efforts" clause was found. *Western Geophysical Co. v. Bolt Associates*, 584 F.2d at 1171-72.

We now turn to the "best efforts" facts, relying mainly on the findings of the district court.

The main obstacle to approval of the transfer was that if the Eastern League agreed to permit NBI to "elevate" (leave the Double-A League and join the Triple-A

League), it would lose both the NBI club and the territory in which the club played. The NBI Double-A team had originally played in Waterbury, Connecticut, but was to move to Scranton in 1987. There was a dispute as to whether the Eastern League had any territorial rights in Scranton. The Eastern League maintained that it did and must be compensated for its loss. McGee was aware of the Eastern League's position on July 15, 1985. On that date, an indemnification committee was formed to make recommendations on what indemnification to seek if NBI elevated; McGee was appointed one of the members. When McGee informed Charles Eshbach, president of the Eastern League, on August 29, 1986, that NBI had made a tentative agreement with the partnership and Kobritz, Eshbach told McGee the committee would have to consider the indemnification issue. McGee then resigned from the Committee because of the conflict of interest and another member was appointed in his place. At this time, Kobritz also called Eshbach, who told Kobritz that he would call a special meeting, probably on September 6, at which Kobritz could make a presentation to the League and the League would then vote on transfer.

Both the International League and the National Association (the governing body of Minor League baseball) also rendered informal opinions on the Scranton territorial issue. Interantional League president Harold Cooper indicated to McGee at the end of August that, in his view, Scranton was open territory. John Johnson, president of the National Association, was of the contrary opinion. McGee telephoned Johnson on September 8 and was informed that he did not believe that special action would be

required to make Scranton an Eastern League territory. Johnson further told McGee that he was sure authority to force relinquishment of the Double-A franchise to the Eastern League could be found in the National Association Agreement. According to McGee, Johnson made it clear that he was judge and jury on the issue.

On September 4, the Eastern League Indemnification Committee met by conference call. The members were unanimously opposed to permitting NBI, by now considered a Scranton club, to elevate to Triple-A; they were reluctant to lose the new stadium that was to be built as well as the territory itself. The members determined that only if NBI relinquished its Double-A franchise to the Eastern League as indemnification for the League's loss would the League approve elevation. Relinquishment as indemnification had never before been required.

McGee was advised of the committee's decision on September 6. By September 7, Eshbach had obtained approval of the relinquishment condition from all Eastern League directors. McGee countered with two offers: (1) $250,000 and an agreement not to dispute that Scranton was Eastern League territory or the amount of indemnification, or (2) an agreement to permit the National Association to determine the territorial rights regarding Scranton but not the amount of the indemnification, and to pay the Eastern League $100,000 regardless of whether Scranton were found to be Eastern League territory. Eshbach reported this offer to the Indemnification Committee on September 8. The committtee instructed Eshbach to advise McGee the Eastern League's position was not negotiable.

McGee met with Eshbach on September 8 and offered to discuss other alternatives to relinquishment. This offer was rejected. He also asked whether the Eastern League would approve the Double-A transfer if the National Association were to determine Scranton was not Eastern League territory. Eshbach replied that he could not guarantee such approval since other locations were more attractive than Maine to the Eastern League.

On August 31, McGee had been informed by Cooper, president of the International League, that the League would not approve the Triple-A franchise transfer to NBI if a dispute with the Eastern League was pending. McGee also faced two other obstacles: (1) in order to obtain the public financing to purchase the Triple-A franchise, it was necessary to furnish an opinion letter that no litigation was pending against NBI; and (2) the need to sign a player development contract between the Triple-A Maine Guides and the Major League Philadelphia Phillies as soon as possible.

On September 9, prior to the meeting of the International League, McGee telephoned Eshbach and agreed to release NBI's Double-A franchise to the Eastern League. McGee then informed Kobritz of the relinquishment and said he would attempt to make a cash settlement. McGee explained to Kobritz that he had agreed to relinquish the franchise in order to get Scranton open in time for the International League meeting.

Kobritz and McGee both attended the International League meeting. Nothing was said at the meeting by either about the relinquishment of NBI's Double-A franchise to

the Eastern League. The International League formally approved the assignment of the partnership's Triple-A franchise to MPSA. The transfer to MPSA rather than NBI was at McGee's specific request.

The facts, no matter how interpreted, point to one indisputable conclusion: Kobritz made little effort[3] to obtain Eastern League approval of the transfer of the Double-A franchise to the partnership. We need not, however, decide, as NBI urges, that this estops the plaintiffs from asserting a "best efforts" violation by NBI. We think that the court applied an impermissibly high "best efforts" standard to McGee's attempt to obtain approval of the franchise transfer.

The court found that McGee did use his best efforts to induce the Eastern League to accept a cash settlement, but held that he did not use his best efforts "to negate the other factors that led him to relinquish the franchise." 655 F. Supp. at 540.

The court found McGee should have inquired more fully how the Eastern League directors felt about the merits of the transfer to Maine, requested an extension of the closing date to obtain time to seek formal National Association review of the issue of the Eastern League's rights in Scranton, examined the National Association Agreement to determine whether relinquishment could actually be forced as indemnification, or sought conditional International League approval of the transfer of the

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3. Kobritz made two telephone calls, one to Eshbach and one to McGee, inquiring as to why the September 6 meeting had been cancelled.

Triple-A franchise to NBI. *Id.* at 541-42. This ignores the time constraints facing McGee and the unanimous position of the Board of Directors that its relinquishment demand and refusal to approve the transfer of the franchise was "not negotiable."

We accept the court's findings as to what actually occurred, but we reject as clearly erroneous its speculation as to what other steps McGee should have taken. We have found no cases, and none have been cited, holding that "best efforts" means every conceivable effort, which is the import of the district court's ruling on this issue.

We hold, applying the proper standard, that McGee did use his "best efforts" to obtain approval of the franchise transfer. Although, as has already been pointed out, Kobritz made little effort, we do not think this is sufficient for finding a breach of the agreement by Kobritz. There are two reasons for our conclusion. First, McGee accepted without objection the burden of attempting to obtain Eastern League approval. Second, NBI has not asked that the September 4 side agreement be cancelled. Kobritz, therefore, has a consulting contract with NBI for $500,000 payable in ten annual installments of $50,000 each.[4]

THE OTHER ISSUES

Two other issues are raised by the plaintiffs as appellants, conversion and a claim for damages against the International League. The plaintiffs claim that NBI and

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4. We are aware that Kobritz assigned this contract to the partnership. The agreement to provide consulting services would, however, remain a personal obligation of Kobritz.

MBSA converted their property by exercising the rights and privileges of membership in the International League without a conveyance. Plaintiffs also argue that they are entitled to damages from the International League because of its failure to act in accordance with its constitution.

Because of our prior findings and rulings, these issues are no longer viable. We are constrained to add that, if we had to reach these issues on the merits, we would affirm the findings and rulings of the district court.

CONCLUSION

We reverse the district court on the September 3 and September 4 contracts and uphold both.

A specific performance decree shall issue from the district court ordering that, upon payment of two million dollars, Triple-A Baseball Club Associates shall forthwith convey all of its right, title and ownership in its baseball franchise in the International League to Northeastern Baseball, Inc. If there have been any changes in ownership of the Triple-A franchise since the inception of this case, the decree shall be worded so as to reflect such changes.

The first payment under the September 4 contract shall be made at the same time as the International League franchise is transferred to Northeastern Baseball, Inc., which shall be the starting date for the annual payments.

The following Judgment Order shall issue:

Judgment for Northeastern Baseball, Inc., in the actions against it by plaintiffs.

Judgment for Multi-Purpose Stadium Authority in the action against it by plaintiffs.

Judgment for Northeastern Baseball, Inc., on its counterclaim for specific performance against plaintiffs.

Judgment for the International League in the Action against it by plaintiffs.

The cross-claims of the International League against Northeastern Baseball, Inc., and Multi-Purpose Stadium Authority seeking contribution and indemnification are dismissed as moot.

Reversed in Part, Affirmed in Part. Remanded for an entry of a specific performance decree in conformity with this opinion.

Costs awarded to Northeastern Baseball, Inc.

No costs in the actions against and for International League of Professional Baseball Clubs.

EXHIBIT A

MEMORANDUM OF AGREEMENT

This Agreement is made and entered into this 3rd day of September, 1986, by and between Triple-A Baseball Club Associates, a Maine limited partnership (hereinafter referred to as "Triple-A") and Northeastern Baseball, Inc., a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania (hereinafter referred to as "Double-A"), and Jordan I. Kobritz and Triple-A Baseball Club of Maine, Inc., a Maine corporation (both hereinafter referred to jointly as General Partner").

WITNESSETH:

WHEREAS, Triple-A is the owner of a professional baseball franchise in the International League of Professional Baseball Clubs; and

WHEREAS, Double-A is desirous of purchasing the Triple-A franchise in the International League of Professional Baseball Clubs; and

WHEREAS, Double-A is the owner of a certain Double-A franchise in the Eastern League of Professional Baseball Clubs and is desirous of selling same to Triple-A; and

WHEREAS, Triple-A is desirous of acquiring same;

NOW, THEREFORE, in consideration of One Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties do hereby agree as follows:

1. Triple-A shall convey at the closing and Double-A shall purchase at the closing all of Triple-A's right, title and interest free and clear of all encumbrances in the franchise in the International League of Professional Baseball Clubs.

2. Double-A shall pay to Triple-A the sum of $2,400,000 for said franchise, which sum shall be payable as follows:

A. $100,000 payable upon the execution of this Memorandum of Agreement, receipt of which is hereby acknowledged, payable to Richard H. Spencer, Jr., Esquire, the "Escrow Agent", to be deposited in an interest-bearing account, interest to accrue for the

benefit of Double-A until closing, provided Double-A does not default herein.

B. $1,900,000 payable at the closing.

C. $400,000 to be paid in the form of a Promissory Note, said Note to provide for interest at the rate of 10% per annum, with accrued interest and principal in the amount of $100,000 to be payable on October 15, 1987, and a like sum of principal and accrued interest on the 15th day of October in the years 1988, 1989, and 1990, said Note to be secured by Irrevocable Letters of Credit in form and substance acceptable to counsel for Triple-A.

3. Double-A shall convey at the closing and Triple-A shall purchase all of Double-A's right, title and interest free and clear of all encumbrances in the franchise in the Eastern League of Professional Baseball Clubs.

4. Triple-A shall pay to Double-A the sum of $400,000 by issuance of a Promissory Note without interest calling for principal payments of $100,000 each on October 15 of the years 1987, 1988, 1989 and 1990.

5. In the event that the Eastern League of Professional Baseball Clubs shall refuse to approve the sale of the Double-A Baseball Franchise to Triple-A, then this Agreement shall continue in full force and effect with the following modifications:

A. The purchase price for the Triple-A Franchise shall be the sum of $2,000,000 payable as follows:

(i) $100,000 payable upon the execution of this Memorandum of Agreement, receipt of which is hereby acknowledged, payable to Richard H.

Spencer, Jr., Esquire, the "Escrow Agent", to be deposited in an interest-bearing account, interest to accrue for the benefit of: Double-A until closing, provided Double-A does not default hereunder;

(ii) $1,900,000 payable at the closing.

6. This Agreement is subject to approval of the Board of Directors of Double-A which approval shall be obtained on or before September 11, 1986.

7. This Agreement is subject to the approval of the Limited Partners of Triple-A, which approval shall be obtained on or before September 11, 1986.

8. This Agreement is further contingent upon the approval of the International League of Professional Baseball Clubs prior to September 11, 1986.

9. The transfer of the Double-A franchise is subject to the approval of the Eastern League of Professional Baseball Clubs.

10. The following conditions precedent shall be required:

A. The approval of the Board of Directors of Double-A which approval shall be obtained before September 11, 1986;

B. Approval by the International League of Professional Baseball Clubs on or before September 11, 1986;

C. The approval of the Limited Partners of Triple-A on or before September 11, 1986.

11. The closing set forth herein shall take place on October 21, 1986 at 443 Congress Street, Portland, Maine 04101 at 9:00 a.m.

12. At the direction of Double-A, Triple-A shall sign a Player Development Contract with the major league team selected by Double-A, provided that such selection shall be completed on or before September 14, 1986.

13. At the direction of Triple-A, Double-A shall sign a Player Development Contract with the major league team selected by Triple-A, provided that such selection shall be completed on or before September 14, 1986.

14. In the event that any of the foregoing conditions shall not have occurred other than approval by the Board of Directors of Double-A, then the deposit with accrued interest shall be refunded to Double-A, and thereafter this Agreement shall terminate. In the event the International League of Professional Baseball Clubs has approved the transfer of the franchises and the Limited Partners of Triple-A shall have approved the implementation of this Agreement and Triple-A shall be ready, willing and able to conclude this transaction, then in such event the monies described in paragraph 1 of this Agreement including all accrued interest thereon shall be retained by Triple-A as liquidated damages and this Agreement shall thereafter terminate.

In WITNESS WHEREOF, the parties have executed this Agreement on the 3rd day of September, 1986.

TRIPLE-A BASEBALL CLUB ASSOCIATES, a Maine Limited Partnership

/s/ Richard H. Spencer
Witness

By: /s/ Jordan I. Kobritz
its General Partner

EXHIBIT B

MAINE GUIDES

B.

AGREEMENT

This agreement is made and entered into this 4th day of September, 1986, by and between Northeastern Baseball, Inc., a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania (hereinafter referred to as "Seller") and Jordan I. Kobritz of Saco, County of York, State of Maine, (hereinafter referred to as "Buyer").

Witnesseth:

Whereas, Seller has recently entered into an agreement to purchase the Triple-A franchise of Triple-A Baseball Club Associates, a Maine limited partnership of which Seller is the general partner; and

Whereas, Triple-A has entered into an agreement to purchase a Double-A franchise owned by Seller; and

Whereas, Seller and Buyer agree to use their best efforts to obtain Eastern League approval of the purchase by Triple-A of Seller's Double-A franchise; and

Whereas, if even after using their best efforts to obtain such approval the Eastern League shall fail to approve the purchase of Seller's Double-A franchise by Triple-A,

Now, therefore, in consideration of One Dollar ($1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties do hereby agree as follows:

1. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the Double-A franchise currently owned by Seller for the purchase price of Five Hundred Thousand Dollars ($500,000.00) payable as follows:

> Fifty Thousand Dollars ($50,000.00) per year for ten years commencing on September 30, 1987, and continuing on each September 30th thereafter to and including September 30, 1996.

2. Seller and Buyer shall enter into a consulting agreement for a period of ten years, whereby Buyer shall provide services to Seller for such ten year period. Seller shall pay Buyer Fifty Thousand Dollars ($50,000.00) per year commencing on September 30, 1987, and continuing on each September 30th thereafter to and including September 30, 1996.

3. In the event that the Eastern League denies approval both to the sale of the Double-A franchise to Triple-A Baseball Club Associates and the sale of the Double-A franchise to Buyer, Seller will reduce the amount of Buyer's consulting agreement by the amount of indemnification damages if Seller is required to pay indemnification damages to the Eastern League in connection with its acquisition of the International League Team. However, in no event shall the amount pursuant to the consulting agreement be reduced below Four Hundred Thousand Dollars ($400,000.00), payable under the same terms as set forth in paragraph above, the first payment commencing on September 30, 1987.

4. This agreement is contingent upon Seller's acquisition of the International League franchise pursuant to

Seller's September 3, 1986 agreement with Triple-A Baseball Associates of Maine.

5. This agreement constitutes the entire agreement between the parties and supersedes any other agreement, oral or written, entered into prior to or as of this date.

In witness whereof, the parties have executed this agreement on the 4th day of September, 1986.

/s/ Robert A. Tambur
Witness
/s/ Jerry A. Kill
Witness

NORTHWESTERN
BASEBALL, INC.
By /s/ John J. McGee
Its President
/s/ Jordan I. Kobritz

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1239

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellees,

v.

NORTHEASTERN BASEBALL, INC.,

Defendant, Appellant.

No. 87-1266

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellants,

v.

NORTHEASTERN BASEBALL, INC.,

Defendant, Appellee.

No. 87-1307

TRIPLE-A BASEBALL CLUB ASSOCIATES, ET AL.,

Plaintiffs, Appellees,

v.

NORTHEASTERN BASEBALL, INC., ET AL.,

Defendants, Appellees,

INTERNATIONAL LEAGUE OF
PROFESSIONAL BASEBALL CLUBS,

Defendants, Appellants.

JUDGMENT

Entered: October 13, 1987

These causes came on to be heard on appeals from the United States District Court for the District of Maine, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed in part, affirmed in part and the cause is remanded to the district court for an entry of a specific performance decree in conformity with the opinion filed this day.

Judgment for Northeastern Baseball, Inc., in the actions against it by plaintiffs.

Judgment for Multi-Purpose Stadium Authority in the action against it by plaintiffs.

Judgment for Northeastern Baseball, Inc., on its counterclaim for specific performance against plaintiffs.

Judgment for the International League in the action against it by plaintiffs.

The cross-claims of the International League against Northeastern Baseball, Inc., and Multi-Purpose Stadium Authority seeking contribution and indemnification are dismissed as moot.

Costs awarded to Northeastern Baseball, Inc.

No Costs in the actions against and for International League of Professional Baseball Clubs.

By the Court:

Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., Plaintiffs v. NORTHEASTERN BASEBALL, INC., Defendant	Civil No. 86-0331-P
TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., Plaintiffs v. INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, Defendant and Third-Party Plaintiff v.	(Cases Consolidated by Agreement) Civil No. 86-0360-P JUDGMENT (Opinion to follow) (Filed February 20, 1987)

MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY,

Third-Party Defendant

CARTER, District Judge

At the joint request of the parties herein the Court enters its judgment in the above entitled matter, the Court's Opinion to follow in due course.

It is hereby *ORDERED* that judgment enter in Civil No. 86-0331-P as follows;

I. *Plaintiffs' Claims*

(1) Judgment on Counts I, II, IV and V of the Plaintiffs' complaint to enter for the defendant, Northeastern Baseball, Inc.;

(2) Judgment on Count III of the Plaintiffs' complaint to enter for Plaintiffs on plaintiffs' claim for a declaratory judgment and it is hereby *DECLARED* and *ADJUDGED* that the September 3, 1986 purchase and sale agreement between the Plaintiffs Triple-A Baseball Club Associates, Jordan Kobritz, and Triple-A Baseball Club of Maine, Inc., general partners, and Northeastern Baseball, Inc. is null, void and without further force or effect having terminated by its own terms on the failure of an implied condition precedent to performance of the agreement; Plaintiffs to return forthwith the contract deposit of One Hundred Thousand Dollars ($100,000) with accrued interest thereon in accordance with Paragraph 14 of said agreement.

II. *Claims of Northeastern Baseball, Inc.*

Judgment is entered on the counterclaims of the Counterclai Plaintiff Northeastern Baseball, Inc.,

against the Plaintiffs Triple-A Baseball Club Associate, Jordan Kobritz, and Triple-A Baseball Club of Maine, Inc., general partners, as follows;

(1) Judgment on Count I of the counterclaim to enter for the Counterclaim Defendants, Triple-A Baseball Club Associates, *et al.;*

(2) Judgment on Count II of the counterclaim to enter for the Counterclaim Defendants, Triple-A Baseball Club Associates, *et al.*

It is hereby *ORDERED* that judgment enter in Civil No. 86-0360-P as follows;

I. *Plaintiffs' Claims Against the International League of Professional Baseball Clubs*

(1) Judgment to enter on Count I for the Plaintiffs, Triple-A Baseball Club Associates, *et al.* on the claim for equitable relief and it is hereby *ORDERED* that the Defendant, International League, restore the Plaintiff, Triple-A Baseball Club Associates, to full membership rights in the Defendant, International League, in accordance with the provisions of the Constitution, By-laws, and Rules and Regulations of the Defendant, International League;

(2) Judgment to enter on Count II for the Defendant, International League of Professional Baseball Clubs;

(3) Judgment to enter on Count III for the Defendant, International League of Professional Baseball Clubs;

(4) Judgment to enter on Count IV for the Defendant, International League of Professional Baseball Clubs;

(5) Judgment to enter on Count V for the Defendant, International League of Professional Baseball Clubs.

II. *Claims of International League Against Plaintiffs*

Judgment is entered on the claims of the International League against plaintiffs, Triple-A Baseball Club Associates *et al., Northeastern Baseball, Inc.* and Multi-Purpose Stadium Authority as follows;

(1) Judgment is *RESERVED* on the cross-claim of the International League against Northeastern Baseball, Inc. and Multi-Purpose Stadium Authority seeking contribution and indemnificatioon as these claims were bifurcated for purposes of trial and remain *PENDING* for later disposition;

(2) Judgment on Count II seeking a declaration that the International League has exclusive jurisdiction to determine whether the Plaintiff Triple-A Baseball Club Associates or Defendant, Northeastern Baseball, Inc. holds membership in the league not to enter, the claims having become *MOOT* on the stipulation at trial of the defendant, International League, that it would honor the Court's decision determining the ownership of the Triple-A franchise as determinative of membership in the International League as between the Plaintiff Triple-A Baseball Club Associates and Defendants Northeastern Baseball, Inc. and Multi-Purpose Stadium Authority;

(3) Judgment to enter on Count III alleging tortious interference with the league's business relationships for the Plaintiffs, Triple-A Baseball Club Associates, *et al.*, and Defendants Northeastern Baseball, Inc. and Multi-Purpose Stadium Authority; and

(4) Judgment to enter on Count IV alleging a breach of contract by failure to comply with the International League's constitution for Plaintiffs, Triple-A Baseball Club Associates, *et al.*, and Defendants Northeastern Baseball, Inc. and Multi-Purpose Stadium Authority.

III. *Plaintiffs' Claims Against the Multi-Purpose Stadium Authority*

Judgment is entered on the claims of Plaintiffs against the Defendant, Multi-Purpose Stadium Authority, as follows;

(1) Judgment on Count I to enter for Defendant, Multi-Purpose Stadium Authority;

(2) Judgment on Count II to enter for Defendant, Multi-Purpose Stadium Authority.

IV. *Costs*

All prevailing parties shall recover costs as provided by law.

A TRUE COPY
By: William S. Brownell,
Clerk
/s/ Susan Whitten
Deputy Clerk

/s/ _____
GENE CARTER
United States District
Judge

Dated at Portland, Maine this 20th day of February, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC.,	
Plaintiffs	Civil No. 86-0331-P
v.	
NORTHEASTERN BASEBALL, INC.,	
Defendant	
TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC.,	(Cases Consolidated by Agreement)
Plaintiffs	Civil No. 86-0360-P
v.	
INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS,	
Defendant, Third-Party Plaintiff	FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION
v.	

MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY,	)	(Filed March 11, 1987)
Third-Party Defendant	)	

CARTER, District Judge

These consolidated actions grow out of a business deal involving the sale of two minor league baseball franchises—the Triple-A Maine Guides and the Double-A Waterbury Indians—and a related dispute over membership in the Triple-A International League of Professional Baseball Clubs. Jurisdiction is based upon diversity of citizenship; the parties stipulate that Maine law controls all issues with the exception that Virginia law controls the formation and corporate status of the International League. The case was tried without a jury, and the Court herein sets forth its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a). Before doing so, the Court will give a brief introductory overview of the parties, the dispute, and the resulting causes of action.

Plaintiffs are Triple-A Baseball Club Associates, a Maine Limited Partnership (hereinafter "the Limited Partnership"); Jordan Kobritz, general partner of the Limited Partnership ("Kobritz"); and Triple-A Baseball Club of Maine, Inc., another general partner of the Limited Partnership. (Kobritz owns all the stock in his corporate general partner.) Defendants are Northeastern Baseball, Inc., a Pennsylvania nonprofit corporation ("NBI"); the Multi-Purpose Stadium Authority of

Lackawanna County, Pennsylvania, an entity of the Commonwealth of Pennsylvania ("MPSA"); and the International League of Professional Baseball Clubs, Inc., a Virginia nonprofit corporation ("International League").

Although not parties, two other important actors in the case are the Eastern League of Professional Baseball Clubs, Inc., ("Eastern League"), and the National Association of Professional Baseball Leagues ("National Association"), the governing body of minor league baseball. Both the International League and the Eastern League are members of the National Association and are bound to operate in accordance with its rules, known as the National Association Agreement.

The main dispute grows out of a September 3, 1986 agreement between the Limited Partnership, its two general partners, and NBI. Under this agreement, the Limited Partnership agreed to sell its Triple-A International League franchise, the Maine Guides, to NBI for $2.4 million and NBI agreed to sell its Double-A Eastern League franchise, the Waterbury (Connecticut) Indians, to the Limited Partnership for $400,000. The agreement was contingent upon the approval of both leagues, with the proviso that if the Eastern League "refuse[d] to approve" the sale of the Double-A franchise to the Limited Partnership, the agreement would remain in effect but the price of the Triple-A franchise would be reduced to $2 million. A September 4, 1986 side agreement between Kobritz individually and NBI provided in part that if in spite of the parties' best efforts the Eastern League refused to approve the sale of the Double-A franchise both to the Limited Partnership and to Kobritz individually,

NBI would pay Kobritz individually a consulting fee of not less than $400,000. This agreement was contingent upon NBI's acquisition of the Triple-A franchise pursuant to the September 3 agreement.

The International League approved the assignment by the Limited Partnership of the Triple-A franchise to NBI and subsequently permitted NBI, rather than the Limited Partnership, to vote at International League meetings.[1] But the Eastern League never approved the transfer of the Double-A franchise either to the Limited Partnership or to Kobritz individually. NBI appeared at the scheduled closing, ready to pay the Limited Partnership $2 million for the Triple-A team but not to convey the Double-A franchise to either the Limited Partnership or Kobritz; Plaintiffs refused to convey the Triple-A franchise.

Plaintiffs assert five causes of action against NBI. Counts I, II, and III all assert that under the September 3 agreement, NBI had a duty to act in good faith and that, because the Eastern League never actually "refuse[d] to approve" the transfer, NBI had a duty to convey the Double-A franchise. Count I asserts that NBI repudiated and Count II that NBI breached its obligations; Count III asserts that the September 3 agreement terminated by its own terms. All three counts seek a declaration that the September 3 agreement is without force or effect and Counts I and II further seek consequential damages resulting from an alleged delay in the Limited Partnership's preparations for the 1987 baseball season. Count IV as-

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[1]As discussed more fully *infra*, the International League actually recognized MPSA as a member; NBI participated in league affairs as MPSA's agent.

serts that NBI converted Plaintiffs' Triple-A franchise by wrongfully exercising membership rights in the International League without holding title to the franchise; Count IV seeks consequential damages as just described plus damages equal to the value of the franchise itself and an injunction against NBI's further exercise of the Limited Partnership's league membership rights. Count V asserts that NBI's bad faith and failure to use its best efforts to obtain Eastern League approval constitute a breach of the September 4 side agreement between NBI and Kobritz individually; Plaintiffs seek damages in an amount equal to the value of the Double-A franchise plus consequential damages.

Plaintiffs assert two causes of action against MPSA, both resulting from NBI's assignment to MPSA of NBI's rights under the September 3 agreement. Count I alleges conversion, asserting the same theory and seeking the same relief as in Count IV of Plaintiffs' complaint against NBI. Count II alleges that the assignment from NBI to MPSA was fraudulent because it was made for less than fair consideration and because NBI had no property interest in the Triple-A franchise that it could assign; Plaintiffs seek an avoidance of the transfer and an injunction against MPSA's further exercise of the Limited Partnership's International League membership rights.

Plaintiffs assert five causes of action against the International League, all based on the league's recognition of NBI (or MPSA) rather than the Limited Partnership as a league member and franchise owner. Count I asserts a violation of the International League's duty to operate in

accordance with its constitution;[2] Plaintiffs seek a declaration that the International League has violated such a duty, and an injunction against further violations. Count II asserts that the International League, its officers, and a majority of its directors have acted oppressively and in breach of fiduciary duties toward the Limited Partnership as a minority member of the league; Plaintiffs seek relief similar to that sought in Count I as well as damages. Count III asserts that the International League wrongfully removed Kobritz from his position as a director of the league; Kobritz seeks a declaration that he remains a director and an injunction against the International League's refusal to treat him as such. Count IV asserts that the International League tortiously interfered in contractual relations between the Limited Partnership and NBI; Plaintiffs seek the value of their bargain with NBI plus consequential damages and an injunction against the International League's refusal to recognize the Limited Partnership as owner of the Triple-A franchise. Count V asserts that the International League converted the Limited Partnership's property and seeks relief similar to that sought in Count IV.

NBI asserts two counterclaims against the Limited Partnership. Count I seeks a declaration that the September 3 agreement remains in effect and an order for specific performance of that agreement for the alternative

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[2]In accordance with Fed. R. Civ. P. 8(f), the Court liberally construes Count I as asserting a claim for breach of contract. The Court notes that the International League itself has treated its constitution as a contract by asserting a breach-of-contract claim against Plaintiffs based on Plaintiffs' asserted failure to comply with league constitution.

consideration ($2 million for the Triple-A franchise) provided for therein. Count II asserts that Plaintiffs' refusal to close constituted a breach of the September 3 agreement and requests incidental and consequential damages and an order for specific performance.

The International League has filed four claims. Count I is a claim against NBI and MPSA seeking a declaration that they are contractually obligated to hold the league harmless for any money judgment entered against the league in this action; this claim has been bifurcated from the others for later disposition. Count II seeks a declaration that the International League has exclusive jurisdiction to determine whether the Limited Partnership or NBI holds membership in the league.[3] Count III asserts that Plaintiffs, NBI, and MPSA have tortiously interfered with the league's business relationships and prospective business advantage and seeks monetary relief. Count IV asserts that Plaintiffs, NBI and MPSA breached a contract by failing to comply with the International League's constitution and similarly seeks monetary relief.

Having previously issued its judgment in this matter in order to accommodate the parties' need for the earliest possible resolution of the dispute, the Court now issues its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

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[3]At trial the International League represented to the Court that it would respect as determinative of league membership the Court's determination of which party owns the Triple-A franchise. The Court therefore considers Count II to be moot.

FINDINGS OF FACT

During 1984 John McGee, president of Northeastern Baseball, Inc. (NBI), explored the possibility of building a Triple-A baseball stadium in the Scranton, Pennsylvania area and purchasing a Triple-A franchise to play in it. He also explored the possibility of obtaining a Double-A franchise to play in the proposed stadium until a Triple-A franchise could be obtained, in the event a Triple-A franchise could not be obtained before or upon completion of the stadium. McGee learned that a Double-A franchise, the Waterbury (Connecticut) Indians of the Eastern League, was for sale, and he arranged to buy it. McGee later became solicitor to the Multi-Purpose Stadium Authority of Lackawanna County, Pennsylvania, (MPSA), a government entity created to build the stadium.

On September 22, 1984, McGee appeared before a meeting of the eight Eastern League directors (one from each member franchise) to seek approval of the franchise ownership transfer as required by the Eastern League constitution. McGee was asked about his plans for owning and operating the Waterbury Indians; he told the league directors of his plans to build a stadium for the 1987 season in Scranton and to operate the team in Waterbury in 1985 and 1986. McGee also told the league directors that he hoped ultimately to bring a Triple-A franchise to Scranton but that the Waterbury team would be moved to Scranton if no Triple-A franchise had been acquired by the time the stadium was ready. Although some Eastern League members felt that McGee would be required to move the Waterbury team to Scranton once the stadium was completed, the minutes of the meeting reflect two separate votes, neither of which established such a requirement. One vote

approved the transfer of the franchise to an NBI subsidiary contingent upon a satisfactory closing of the deal with the franchise's then-current owners; the other vote authorized the Waterbury franchise to move to Scranton contingent upon the completion of a stadium satisfying Eastern League standards.

At the same meeting the Eastern League held two more formal votes conditionally approving the transfer of another Eastern League franchise to a new owner and a new city. These votes and the votes on the transfer of the Waterbury franchise were in accordance with the Eastern League's usual procedure for considering and voting on a request for approval of the transfer of a franchise.

In March of 1985, McGee wrote to Eastern League president Charles Eshbach requesting that the Eastern League approve NBI's exploration of the possibility of obtaining a Triple-A franchise for Scranton. The letter noted that although NBI was not at the time operating in Scranton, such approval was required by Section 10.08(f) of the National Association Agreement, the set of rules governing minor league baseball. That section requires that "[b]efore a franchise operator . . . may explore the possibility of elevating his city to a league of higher classification, he must first obtain the written permission of a majority of the directors of the league of which his club is a member" or face a $2500 fine. A Triple-A league such as the International League is a league of "higher classification" than the Double-A Eastern League. After polling the Eastern League directors, Eshbach wrote to McGee in June of 1985 conditionally granting permission for "the Waterbury/Scranton franchise" to explore elevation, em-

phasizing that the league had not approved of Scranton actually elevating to Triple-A nor had the league waived its right to "compensation" from NBI in the event NBI actually elevated.

Eshbach's mention of "compensation" referred to a payment that would be made to the Eastern League to compensate the league for the loss of its asserted "territorial rights" in Scranton. Territorial rights are created by Section 10.06 of the National Association Agreement; such rights basically cover a ten-mile radius around the city in which a franchise is granted, "provided the franchise holder operates a [club] within such protected territory." Both the league and the club hold these territorial rights, the effect of which is that no club in any league party to the National Association Agreement may play within the protected territory of another club and league without first obtaining the consent of that club and league. Under Section 10.08 of the National Association Agreement, a league and club of higher classification (*e.g.*, Triple-A) may acquire or "draft" the territory belonging to a league and club of lower classification (*e.g.*, Double-A). Section 10.08 requires the acquiring league and club to pay compensation to the league and club giving up the territory; the amount may be determined by agreement of the parties, or, failing agreement, by binding arbitration. Section 10.08 thus appears to contemplate a four-party transaction in which, for example, a Triple-A league and club acquire the territory of and pay compensation to a Double-A league and club. The Double-A league and club may then draft (and pay compensation for) Single-A territory into which to relocate the displaced Double-A club.

This is to be distinguished from a three-party transaction in which a club itself, *e.g.*, a Double-A club, seeks to leave a Double-A league and join a Triple-A league, *i.e.*, to "elevate." In such a case the Double-A league would be losing both territory and a club. Although Section 10.08 does not on its face require that the Double-A league be compensated in case of elevation, in practice a club elevating from a Double-A league to a Triple-A league has itself paid "indemnification" to compensate the Double-A league for its loss of territorial rights. In 1984 an Eastern League club in Buffalo, New York paid the Eastern League $16,000 in exchange for permission to leave that league for a Triple-A league. Also in 1984, a Double-A club in Nashville, Tennessee paid its Double-A league between $170,000 and $250,000 for permission to leave that league for a Triple-A league.

Eshbach's June 1985 letter to McGee, conditionally approving NBI's exploration of elevation to Triple-A, notified McGee that the Eastern League directors felt that, concerning compensation, the Buffalo precedent was not applicable and that any indemnification would be strongly influenced by the Nashville settlement. By this Eshbach meant that the Eastern League had a stronger interest in having a franchise in Scranton than it did in Buffalo, and thus the amount of indemnification that the Eastern League would seek if NBI sought to elevate to Triple-A would be closer to the $170,000-$250,000 Nashville figure than the $16,000 Buffalo figure.

At a July 15, 1985 Eastern League meeting, NBI's request to investigate elevation to Triple-A was once again discussed. McGee stated his view that tying indemnifica-

tion to that request was premature; and Indemnification Committee was formed to make recommendations on what indemnification ultimately to seek if NBI elevated. McGee, Eshbach, and two other league directors (Jerry Mileur and Stuart Revo) agreed to serve on the committee. The league then voted to grant NBI "permission to explore elevation to Triple-A with the understanding that approval to make such elevation will be forthcoming from the league's Directors only if Scranton (the current Waterbury club) and the league can reach full and formal agreement on the amount and payment of indemnification by Scranton to the league without resorting to arbitration or litigation." McGee was thus on notice that the Eastern League directors believed the league had territorial rights in Scranton, even though NBI's club was at the time playing in Waterbury rather than Scranton. McGee expressed at this time his view that the league had no such rights.

The Indemnification Committee met in November of 1985 and discussed various criteria for determining the amount of indemnification that NBI should pay if it elevated to Triple-A. The committee discussed a possible range of $50,000 to $250,000, within which the criteria would be used to set an exact amount, but the committee did not finally agree on a recommendation to the league as a whole. The committee met again in December of 1985. Revo asked if NBI would agree then and there to pay the Eastern League $200,000 at such time in the future as Scranton elevated to Triple-A; McGee refused. The committee again failed to agree on a recommendation to the league.

In June of 1986, McGee approached Jordan Kobritz, a general partner of Triple-A Baseball Club Associates, a

Maine Limited Partnership ("the Limited Partnership"), about the possibility of purchasing the Maine Guides, a franchise in the Triple-A International League, and selling NBI's Double-A franchise. The Triple-A franchise would move to Scranton and the Double-A franchise would move to Maine. McGee offered Kobritz the Double-A franchise plus $400,000 for the Triple-A franchise. Kobritz said that $400,000 was not enough. McGee also discussed his intentions with regard to the stadium to be built by MPSA in Scranton.

In July of 1986 McGee increased the cash portion of his offer to 2 million dollars. McGee told Kobritz he felt that the Eastern League had no territorial rights to Scranton but that the League might nevertheless seek money in connection with the proposed transfer. On July 30, McGee forwarded to Kobritz a $100,000 deposit and drafts of two agreements, one providing that NBI would buy the Triple-A franchise from the Limited Partnership for $2.4 million and the other providing that Kobritz individually would buy NBI's Double-A franchise for $400,000. Kobritz never signed these agreements; he retained the $100,000 check without depositing it.

On August 20, Kobritz forwarded to McGee a draft agreement between NBI and the Limited Partnership, Kobritz as general partner, and Triple-A Baseball Club of Maine, Inc., the other general partner. (Kobritz is the sole shareholder of his general partner Triple-A Baseball Club of Maine, Inc.) The net effect of the agreement was to transfer the Double-A franchise and $1.2 million from NBI to the Limited Partnership, to transfer the Triple-A franchise from the Limited Partnership to NBI, and to transfer $800,000 from NBI to the general partners. Kobritz in-

tended to use some of that $800,000 to buy out those of his limited partners who were not interested in operating a Double-A franchise. This agreement contained four "conditions precedent": the approval by September 11, 1986 of the NBI board, Kobritz's limited partners, the International League, and the Eastern League. The agreement also made the transfer of the Triple-A franchise expressly contingent upon receipt of the Double-A franchise. Kobritz obtained his limited partners' approval of this agreement on August 24, but McGee never signed the agreement.

Late in August, Kobritz and McGee agreed to contact their respective league presidents to discuss seeking approval of the two franchise transfers as required by the league constitutions. On August 28, both McGee and Kobritz called International League president Harold Cooper, informing him that an agreement had been reached. Kobritz told Cooper that he and McGee had a "firm understanding" and he requested that Cooper call a special meeting of the International League so that the franchise could be transferred. Kobritz said he needed the meeting as soon as possible so that a player development contract could be signed with the Philadelphia Phillies. Cooper was not informed about any of the specific terms of the deal between Kobritz and McGee. Cooper scheduled an International League meeting to approve the sale for September 9 in Rochester, New York.

On August 29, 1986 McGee informed Eastern League president Eshbach that NBI had reached an agreement with Jordan Kobritz and the Limited Partnership involving the transfer of the Double-A franchise to the Limited Partnership and the Triple-A franchise to NBI. Eshbach advised McGee to submit a formal written request (1) that

the Eastern League approve the transfer of the Double-A franchise to Kobritz or the entity he represented and (2) that the Eastern League permit NBI to "elevate" from Double-A to Triple-A. Eshbach also informed McGee that the Indemnification Committee would have to meet to discuss the issue, at which point McGee asked to be removed from the committee to avoid a conflict of interest. Eshbach agreed to do so and subsequently appointed Ben Bernard of the Albany franchise to replace McGee on the committee. Also on August 29, Kobritz called Eshbach, who told Kobritz that he would call a special Eastern League meeting at which Kobritz would make a presentation to the league, league members would ask him questions, and then would vote on the transfer. Eshbach said that the meeting would probably be on September 6. Also on August 29, Kobritz held a press conference to announce the sale; on McGee's instructions, he identified the purchaser of the Triple-A franchise as MPSA.

McGee drafted a letter to Eshbach and read the draft to International League president Harold Cooper on August 30 or 31. Cooper had just recently talked to Johnny Johnson, president of the National Association (the governing body of minor league baseball). Johnson had told Cooper that there was a dispute over whether Scranton was Eastern League territory, that he (Johnson) was not familiar with all the facts of the case, that he had never ruled on the question, and that no "exception" had been granted under Section 10.06(b) giving the Eastern League or NBI territorial rights in Scranton.[4] After McGee read

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[4]Section 10.06(b) permits the National Association president and Executive Committee to grant "exceptions" to the territorial

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Cooper the draft letter, Cooper told McGee that in his view Scranton was open rather than Eastern League territory; he reported that Johnson had said no exception had been granted covering the Scranton situation. Cooper also told McGee that the Scranton territorial issue had to be resolved before the September International League meeting called to consider Kobritz's request to approve the transfer of the Triple-A franchise to NBI. Cooper wanted to avoid the inter-league friction that would be created by the transfer of an International League team into territory as to which the Eastern League had an unsatisfied territorial claim.

On September 1, 1986, McGee sent the letter to Eshbach requesting that the Eastern League approve the sale of the Double-A franchise to Kobritz or an entity in which Kobritz had or would have an interest. McGee stated that he had an agreement to purchase Kobritz's Triple-A franchise and move it to Scranton. He noted that although in his view Scranton was not Eastern League territory, if the Eastern League believed that it was and if the National Association had so determined, then the letter should also be treated as a request to "elevate" to Triple-A. Because the question was open, McGee's letter continued, it was inappropriate at that time to enter into an indemni-

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rights rule after giving notice and an opportunity to be heard to all affected leagues and clubs. The grounds for granting such exceptions are not stated. But the parties agree that the impending move of a franchise into a city might provide grounds for granting an exception to the rule that a franchise must "operate" in a city made to establish territorial rights therein. Thus either NBI or the Eastern League could have requested recognition of their territorial rights in Scranton even though NBI operated its franchise in Waterbury, Connecticut.

fication agreement with the Eastern League; instead, he recommended "that the Eastern League determine an amount which it deems equitable and then ask the National Association to rule on the amount of damages should the National Association make a determination that Scranton is Eastern League territory."

On August 31 and September 1 Eshbach called the other Indemnification Committee members to set up a meeting for September 4, and he tentatively arranged a full Eastern League directors meeting for September 6 to consider the formal written request he anticipated receiving from McGee. Eshbach told the league directors what little he knew about the terms of the Kobritz-McGee deal, including the fact that the deal involved the transfer of the Double-A franchise to Maine. None of the directors expressed reservations about approving the transfer to Maine; their only concern was the need to resolve the indemnification issue with NBI. On September 1 Eshbach spoke to Kobritz, telling him of the Eastern League meeting tentatively set for September 6, discussing with him what to expect at the meeting, and advising him of the issues that Eshbach thought the Eastern League would want addressed regarding who would own the franchise, where it would play, and the status of a rumored dispute between Kobritz and some of his limited partners.

On September 3, McGee and Robert Tambur, a member of the NBI board, flew to Portland to finalize the terms of the agreement with Kobritz. They proceeded directly to the office of Richard Spencer, Kobritz's attorney; McGee showed Kobritz a copy of McGee's September

1 letter to Eshbach discussing the territorial rights dispute, mentioning indemnification damages, and requesting Eastern League approval of the transfer of the Double-A franchise. McGee also showed Kobritz documents indicating MPSA's involvement in financing the deal. Before Spencer entered the room, Kobritz said that there might be a problem in securing Eastern League approval of the transfer of the Double-A franchise to the Limited Partnership because of dissent that had arisen among some of his limited partners. These dissenters did not want to operate a Double-A team and were challenging the legal validity of the August 24 limited partners' vote approving the August 20 agreement. The dissenters opposed that agreement because it made the sale of the Triple-A franchise expressly contingent upon acquisition of a Double-A franchise by the Limited Partnership. The dissenters were making public statements that were uncomplimentary to the Eastern League. Kobritz stated that if the Eastern League refused to approve the transfer of the Double-A franchise to the Limited Partnership, he wanted a side agreement whereby he would acquire the Double-A franchise individually and then operate it with those of his limited partners who wanted to do so. Kobritz felt a side agreement assuring his individual acquisition of the Double-A franchise was necessary because the dissenters would not approve the main agreement if it appeared to assure that the Limited Partnership would be acquiring a Double-A franchise. McGee and Tambur stated that they had no objections to such an arrangement. Neither McGee, Tambur, nor Kobritz considered the possibility that the Eastern League might not approve the transfer for reasons other than the dissent among the

limited partners—*e.g.*, because of the territorial rights dispute.[5]

Spencer then brought in a new draft agreement that provided for NBI to purchase the Triple-A franchise for $2.4 million and the Limited Partnership to purchase the Double-A franchise for $400,000. Unlike the August 20 draft, however, this agreement did not make the transfer of the Triple-A franchise expressly contingent upon the transfer of the Double-A franchise to the Limited Partnership. Instead, the new agreement provided that if the Eastern League "shall refuse to approve the sale" to the Limited Partnership, the agreement would "remain in full force and effect;" the sale of the Triple-A franchise would nevertheless go through, but NBI would pay $2 million instead of $2.4 million to the Limited Partnership. By "refuse to approve the sale" the Court finds that the parties meant "refuse to approve the sale on its merits." The new agreement also dropped "approval of the Eastern League by September 11" from the list of "conditions precedent" in the August 20 draft; instead, the new

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[5]At trial, Kobritz testified that this discussion took place at the Portland Jetport before the group left for Spencer's office. Tambur testified that it took place in Spencer's office before Spencer entered with a new draft of the main agreement. McGee testified that it took place after the parties signed the main agreement and Spencer left the office. The Court credits Tambur's and McGee's testimony that there were no substantive discussions at the Jetport, but credits Tambur's and Kobritz's testimony that the discussion occurred before the signing of the main agreement. The Court does so because Tambur's demeanor and less direct involvement in the litigation made him more credible and because on the more important issue of when (rather than where) the discussion took place, Tambur's version is against NBI's interest and thus is more credible than McGee's version. Finally, McGee's testimony on the question was somewhat contradictory; at one point he testified that Kobritz asked

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draft merely stated that the transfer of the Double-A franchise was subject to Eastern League approval. Because of these differences, the new draft also required the approval of the Limited Partners; Kobritz hoped the changes would satisfy the dissenters and render moot any dispute over the legal validity of the August 24 limited partners' vote approving the August 20 draft. McGee asked that the closing date on the new draft be changed from September 14 to October 21, to allow him sufficient time to obtain $2 million in public financing with which to purchase the Triple-A franchise. Kobritz agreed to this change. Kobritz did not ask that the draft be changed to provide for NBI to pay $2.4 million even if the Eastern League refused to approve the transfer of the Double-A franchise to the Limited Partnership.[6]

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McGee about the side agreement "on the morning of September 3" which would place the conversation prior to Spencer's presentation of the new draft of the main agreement.

[6]McGee testified that Kobritz made such a request, to which McGee claims he responded that he could go no higher because he could only obtain $2 million in public financing. McGee's theory is that Kobritz preferred selling the Triple-A franchise for $2.4 million in cash rather than a net $2 million plus a Double-A franchise; McGee thus seeks to establish that Kobritz did not really want the Double-A franchise. But Tambur testified that Kobritz never asked to change the price from what had been discussed earlier, *i.e.*, a net price of $2 million. For the reasons previously stated, the Court credits Tambur's testimony. Moreover, because the Court has found that McGee and Tambur had at this point not objected to Kobritz's proposal for a side agreement under which he would acquire the Double-A franchise, it is unlikely that Kobritz would suddenly ask for an additional $400,000 out of the deal as a whole. At this point the Court finds that the net terms of the deal were (as they had been at least as early as July 30) intended to be $2 million plus the Double-A franchise in exchange for the Triple-A franchise, although no one knew whether the Double-A franchise would initially be transferred to the Limited Partnership or to Kobritz individually.

Spencer left the room and Kobritz began drafting the side agreement between himself individually and NBI. The draft recited that NBI had recently entered into an agreement to purchase the Limited Partnership's Triple-A franchise and that the Limited Partnership had recently entered into an agreement to purchase NBI's Double-A franchise. It further recited that "Whereas [NBI] and [Kobritz] agree to use their best efforts to obtain Eastern League approval of the purchase by [the Limited Partnership] of [NBI's] Double-A franchise; and Whereas, if even after using their best efforts to obtain such approval the Eastern League shall fail to approve the purchase of [NBI's] Double-A franchise by the [Limited Partnership]," the side agreement would become effective. Under the side agreement, Kobritz would purchase the Double-A franchise from NBI for $500,000; NBI would hire Kobritz as a consultant for a fee of $500,000. (The Court finds that the parties intended the words "fail to approve" to have the same meaning as the words "refuse to approve" in the September 3 main agreement.) Because the two payments canceled each other, the stated price was irrelevant to the net effect of this agreement. McGee had suggested, therefore, that the franchise be assigned a value of $500,000 (rather than the $400,000 specified in the main agreement); he believed that the Eastern League directors would be pleased to see one of their league's franchises valued so highly and would thus be more likely to approve the transfer to Kobritz.[7]

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[7]Kobritz testified that he drafted this side agreement during the previous discussion, before Spencer entered the room. Tam-

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Spencer returned to the room with a new copy of the agreement between NBI and the Limited Partnership, incorporating the modifications agreed upon earlier in the meeting. The parties signed both the main and side agreements and McGee and Tambur returned to Scranton. Kobritz then assigned his rights under the side agreement to the Limited Partnership in order to make clear, should any question arise, that he was acting in the Limited Partnership's rather than his own interest. At a limited partners meeting that evening, Kobritz presented the main agreement in detail and described the side agreement in general terms as a guarantee that the Limited Partnership would enjoy the financial benefits of ownership of the Double-A team. Kobritz did not go into detail because he feared that the dissenters would view the two agreements and the assignment, taken together, as equivalent to the August 20 draft agreement which they had opposed. The limited partners then approved the main agreement by a show of hands and later by a written vote.

As they returned to Scranton on September 3, McGee and Tambur discussed modifying the side agreement to clarify what might happen if the Eastern League refused

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bur testified that Kobritz drafted the agreement after Spencer left the room. The Court credits Tambur for the reasons previously stated and for the following additional reason. If the discussion of valuing the Double-A franchise at $500,000 had occurred before Spencer brought in the draft of the main agreement, it appears likely that the parties would have changed (or at least discussed changing) the value assigned to the Double-A franchise in the main agreement as well. The parties' failure to do so suggests that they discussed revaluing the franchise, and thus drafted the side agreement, only after discussing the main agreement.

to approve the transfer to Kobritz individually. They had no specific reason to believe that such a refusal might occur, other than that the dissent among Kobritz's limited partners might somehow adversely affect the league's view of Kobritz individually. But McGee and Tambur nevertheless felt that the side agreement should be modified to provide Kobritz with a consulting fee in the event the Eastern League refused to approve the transfer to him individually. They felt that such a provision would also make the September 3 agreement with the Limited Partnership clearer and more final.[8]

Early on September 4, Eshbach received McGee's letter of September 1. Eshbach wrote to International League president Cooper telling him of the Eastern League's position that Scranton was Eastern League territory and requesting that the International League refrain from acting pending Eastern League action on the dispute with McGee. Eshbach also wrote to McGee reiterating the Eastern League's position that it had territorial rights in Scranton and informing McGee that the Eastern League was "withholding its permission for the Scranton club to elevate to Triple-A, pending further discussions and agreements on the issue of indemnification." The letter also noted that an Indemnification Committee meeting was scheduled for that night (September 4) and that Eshbach would brief McGee on any progress; Eshbach stated that he hoped an agreement could be reached by the following week and finalized at an Eastern League meeting.

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[8]The Court infers, and finds as fact, that McGee and Tambur wanted to insure that Eastern League nonapproval of the sale to Kobritz would not render the main September 3 agreement, under which NBI would acquire the Triple-A franchise, void for want of consideration.

On September 4, Tambur called Kobritz and suggested that the side agreement be changed to provide Kobritz with a consulting fee in the event the Eastern League refused to approve the transfer to him individually. Kobritz asked, "What do you know that I don't know?" Tambur replied that there was nothing, that he and McGee merely felt Kobritz needed additional protection. Kobritz asked to talke to McGee before agreeing to any modifications.

McGee then called Kobritz, who asked what was going on. McGee said, "Nothing." Kobritz asked why McGee wanted to modify the side agreement; McGee explained that he wanted to provide for a consulting fee to Kobritz in case of Eastern League nonapproval so that the NBI board, at its meeting scheduled for September 5, would not view the deal as potentially void (*i.e.*, for want of consideration). At 2:24 p.m. McGee transmitted a facsimile of ("faxed") the side agreement with proposed modifications to Kobritz, asking Kobritz to call back if he had questions.

Eshbach's wife left a message with McGee's office at 3:18 p.m. on the afternoon of September 4 notifying McGee that the Eastern League meeting tentatively scheduled for September 6 had been postponed and that Eshbach would be in touch. Eshbach left a similar message at Kobritz's office.

Kobritz then called McGee, asking why the Eastern League meeting had been canceled. McGee replied that he had received a similar message from Eshbach but that he did not know the reason for it. Kobritz asked if the modi-

fications to the side agreement changed the deal in any way; McGee replied that they did not. Kobritz again asked if there was anything he should be aware of and McGee replied, "Not that I know of." (The Court finds that at this time neither Kobritz nor McGee knew or reasonably should have known that the Eastern League would not approve the transfer to Kobritz individually or that the Eastern League would demand that NBI relinquish the franchise to the league.) Kobritz made some minor modifications clarifying how he would be paid his consulting fee.[9] This side agreement expressly superseded the side agreement signed on September 3. It was identical to the September 3 side agreement in most respects, including the "best efforts" language and other recitals and the agreement that if the Eastern League failed to approve the transfer to the Limited Partnership, NBI would sell the franchise to Kobritz for $500,000 and would pay Kobritz a consulting fee of $500,000. But the September 4 side agreement provided for an additional contingency: that in the event the Eastern League "denie[d] approval" of the sale not only to the Limited Partnership but also to Kobritz individually, NBI would reduce Kobritz's consulting fee, but not below $400,000, by the amount of indemnification damages if any that NBI was required to pay to the Eastern League. (The Court finds that the parties intended the words "denie[d] approval" to have the same

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[9]The Court does not credit Kobritz's testimony that these changes were meant to reflect his intent that the consulting fee was not a substitute for the transfer of the Double-A franchise. If Kobritz had desired at the time to make his preference for a Double-A franchise clearer than it already was, he would have done so using more explicit language. The changes he did make do not reflect such an intent.

meaning as the words "refuse to approve" in the September 3 main agreement.) The September 4 side agreement was made expressly contingent upon NBI's acquisition of the Triple-A franchise from the Limited Partnership. Kobritz signed the agreement and "faxed" it back to McGee at 3:28 p.m., at which time McGee also signed it. Kobritz then assigned to the Limited Partnership his rights under the September 4 side agreement.

At 4:40 p.m. on September 4, Kobritz called Eshbach to ask why the Eastern League meeting of September 6 had been canceled. Eshbach replied that there was a two-part problem, the first part of which he did not identify but said needed to be resolved before the Eastern League could consider the second part—approval of the transfer of the Double-A franchise to Maine. (By the "first part of the problem Eshbach meant the territorial rights indemnification issue.) Kobritz asked if the first part of the problem directly affected him or the transfer of the Double-A franchise to Maine, and Eshbach responded that it did not.

At 4:58 p.m. on September 4, the Eastern League Indemnification Committee met by conference call; participating were Bernard, Mileur, Revo, and Eshbach. The members expressed strong opposition to permitting Scranton to elevate to Triple-A; they felt that the Eastern League had expended time and effort in assisting NBI, that the proposed Scranton stadium would be the flagship facility of the league, that Scranton fit well with the league geographically, and that Scranton's elevation would hurt the league's reputation. The members felt that McGee's September 1 letter to Eshbach disputing the Eastern

League's territorial rights was not in good faith, given that McGee had requested permission to explore elevation to Triple-A, had previously served on the Indemnification Committee, and in the members' view had previously offered to settle.

Mileur then suggested that the Eastern League withhold permission for Scranton to elevate to Triple-A unless Scranton relinquished its Double-A franchise to the Eastern League. The Eastern League would then sell the franchise to a new owner of its choice and either divide the proceeds among the remaining member franchises or use the proceeds for league purposes. This would not only compensate the league for losing the Scranton territory but also give the league ultimate control over the placement of the franchise in a new city with a new owner. The committee instructed Eshbach to seek full Eastern League approval by phone of the following two-part response to the request contained in McGee's letter of September 1. First, the league would not consider any proposed transfer of NBI's Double-A franchise unless NBI first satisfied the Eastern League's right to indemnification for the loss of the Scranton territory. Second, the Eastern League would not give NBI permission to elevate to Triple-A unless NBI relinquished its Double-A franchise to the Eastern League as such indemnification. The committee meeting ended without any substantial discussion of the merits of Kobritz or the Limited Partnership as potential owners or the merits of Maine as a potential location of the Double-A franchise. At least one committee member, Revo, felt that focusing on indemnification by NBI and refusing to even consider the proposed transfer to Maine might be a way to keep Scranton in the Eastern League while at the

same time reducing the chance of the Eastern League being sued by Kobritz or the Limited Partnership.

Before the September 4 Indemnification Committee meeting, the idea of franchise relinquishment as indemnification had been raised only once, in passing, in a conversation in August between Eshbach and Mileur. Until the September 4 meeting no one in the Eastern League seriously considered franchise relinquishment as an option in dealing with NBI, and neither McGee nor Kobritz was aware that relinquishment was even a possibility until after September 4. Such a demand is unprecedented in minor league baseball.

Between September 5 and 7 Eshbach attempted to contact the other Eastern League directors to obtain approval for the Indemnification Committee's recommended response to McGee's September 1 request. On September 6 Eshbach phoned McGee and told him of the committee's recommendation. This was the first McGee had heard of relinquishment; he was shocked and promised to get back to Eshbach. Later on September 6 McGee phoned Cooper, told him of the Eastern League's position, and asked for National Association president Johnson's home phone number. Cooper gave McGee the number and told McGee once again that the International League viewed Scranton as open territory.

By September 7 Eshbach had obtained the approval of all the Eastern League directors (other than McGee) and called McGee again to tell him that the league's demand for franchise relinquishment was official. McGee responded with a two-pronged offer: Scranton would either (1) pay $250,000 to the Eastern League and agree

not to appeal to the National Association the questions of the existence of territorial rights to Scranton or the appropriate amount of indemnification or (2) agree to seek a National Association determination of territorial rights to Scranton and not on the question of the amount of indemnification; if the National Association decided that Scranton was not Eastern League territory, NBI would nevertheless pay $100,000 to the Eastern League. McGee told Eshbach that he needed the indemnification dispute decided before the International League met on September 9 to consider the proposed transfer of the Triple-A franchise to Scranton; Cooper had told McGee that Scranton would have to be open territory in order for the International League to approve the transfer.

On September 8 the Indemnification Committee met again by conference call and Eshbach reported McGee's two-pronged offer. There was no discussion of the merits of the transfer to Maine, of asking McGee for more than $250,000, or of how to respond if he made a higher offer. In light of the Eastern League directors' unanimous (excepting McGee) endorsement of the Indemnification Committee's recommendation, and the directors' feeling that there was no serious basis for asserting that Scranton was not Eastern League territory or for submitting the question to the National Association, the committee instructed Eshbach to inform McGee that the Eastern League's position was nonnegotiable.

At noon on September 8 McGee called National Association president Johnson. McGee asked what effect submission of the territorial rights question to the National Association would have on the International League's expected September 9 approval of the transfer

of the Triple-A franchise to Scranton. Johnson replied that if the issue were submitted to him, the International League's approval of the transfer of the Triple-A franchise to Scranton would not be given any effect unless and until Johnson determined that Scranton was open rather than Eastern League territory. McGee told Johnson that the International League viewed Scranton as open territory; Johnson was already aware of the two leagues' respective positions, including the Eastern League's position that NBI should relinquish its Double-A franchise as indemnification. Johnson stated that, based on what he had been told about the terms of NBI's admission to the Eastern League—*i.e.*, that the team was a Scranton team with a two-year holding period in Waterbury until the Scranton stadium was complete—that no exception under Section 10.06 would be necessary to make Scranton Eastern League territory. Regarding the amount and type of indemnification, Johnson said that the Buffalo and Nashville monetary settlements were distinguishable and that he was sure that somewhere in the National Association Agreement he could find authority to force relinquishment of a franchise as indemnification for a loss of territorial rights. McGee had not (in fact, never) examined Section 10.06 of the National Association Agreement, one of the two sections most germane to these questions. Nor was McGee aware of any provision of that Agreement giving the Eastern League the right to demand that he relinquish his franchise as indemnification for territorial rights.

At about 2:30 p.m. on September 8, McGee met with Eshbach, who informed him that the Eastern League had rejected McGee's two-pronged offer. McGee asked Eshbach how much cash it would take to resolve the problem

without relinquishing the franchise. McGee also asked whether, if the National Association were asked to decide and did decide that Scranton was not Eastern League territory, the Eastern League would then be inclined to approve the transfer to Kobritz and the Maine group. Eshbach replied that he could not guarantee such approval because there were other locations, such as Harrisburg, Pennsylvania, that were more attractive to the Eastern League than Maine. Finally, McGee asked Eshbach to write a letter stating that the Eastern League refused to approve the transfer of the Double-A franchise to Maine; McGee wanted something in writing to give to Kobritz the next day. Eshbach and McGee began drafting the letter; Eshbach then called Revo, who asked if McGee would still have a deal with the Limited Partnership if he could not transfer the Double-A franchise. Eshbach relayed this question to McGee who answered in the affirmative, showing Eshbach the alternative cash provision in the September 3 agreement. Eshbach relayed this to Revo, who then advised Eshbach not to give McGee the requested letter. Eshbach then put McGee on the line, and McGee told Revo that he wanted to settle the matter by paying the Eastern League money. Revo responded that the Eastern League wanted the franchise rather than money, and McGee said that Eshbach had been telling him the same thing. Revo also told McGee that the Eastern League wanted NBI to agree to hold the league harmless in the event of a suit by Kobritz or the Limited Partnership based on the league's actions in blocking the transfer.[10]

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[10]At trial the Court sustained hearsay objections to questions designed to elicit from McGee his version of the conver-

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At 7:00 a.m. on the morning of September 9, before the International League meeting, McGee telephoned Eshbach and agreed that NBI would relinquish the Double-A franchise to the Eastern League, but McGee said he had no authority to agree to hold the league harmless against a suit by Kobritz or the Limited Partnership. McGee asked Eshbach to attend the NBI board meeting scheduled for the evening of September 10, present the league's demand to be harmless, and allow NBI to make another attempt to get the league to accept a cash settlement.

McGee agreed to relinquish the franchise because of five factors. First, he believed the Eastern League would not accept a cash settlement of the territorial rights dispute. Second, he believed that even if the dispute could be settled with cash, the Eastern League would not approve the transfer to the Limited Partnership or to Kobritz because the league preferred locations other than Maine. Third, he believed the Eastern League would take any action necessary, including litigation or arbitration before the National Association, to enforce its territorial rights claim; in view of these possibilities, McGee felt he could not issue a "no threat of litigation" opinion letter, required to obtain the $2 million in public financing to purchase the Triple-A franchise, unless he settled the

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sations with Eshbach and Revo. Upon reflection the Court is of the view that McGee's testimony should have been permitted for the limited purpose of establishing his state of mind just before he decided to relinquish the franchise. Such testimony could not, however, have been relevant to the existence or non-occurrence of the implied condition precedent on which the Court bases its disposition of the merits of the dispute between NBI and the Limited Partnership.

Eastern League's claim. Fourth, McGee believed it would be fruitless to seek a National Association determination on the territorial rights question, because he believed that Johnson had already made up his mind both that Scranton was Eastern League territory and that forced franchise relinquishment was authorized by the National Association Agreement. Fifth, McGee believed that the International League would not approve the transfer of the Triple-A franchise to Scranton at its September 9 meeting unless he could represent to the league that he had settled the Eastern League's claim of territorial rights to Scranton.

McGee met with Cooper on the morning of September 9 before the International League meeting and told Cooper that he had bad news for Kobritz: NBI could not deliver a Double-A franchise to Kobritz because it was relinquishing the franchise to the Eastern League as indemnification. Cooper asked whether that affected McGee's deal to acquire the Triple-A franchise from Kobritz; McGee responded that it did not because of the alternative cash provision. Cooper replied that in that case it was a private matter between McGee and Kobritz and he would therefore not raise it at the International League meeting. By this time Cooper had received Eshbach's September 4 letter asserting that Scranton was Eastern League territory, noting that the Eastern League was working with McGee regarding his desire to elevate, and asking the International League not to act until the Eastern League had acted.

After this conversation with Cooper, but before the International League meeting, McGee met with Kobritz at breakfast. McGee told Kobritz that the Eastern League

had rejected his offer of $100,000 (the second prong of McGee's two-pronged offer) and had asked him to relinquish the Double-A franchise instead. McGee mentioned a $250,000 figure and told Kobritz that he would try to get the NBI board to offer a cash settlement to Eshbach so that Kobritz could get the Double-A franchise. But McGee said that in order to get the Scranton territory open in time for the International League meeting, he had told Eshbach that he would relinquish the Double-A franchise. McGee also told Kobritz that there were locations other than Maine where the Eastern League would like to have a Double-A franchise.[11]

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[11]The McGee and Kobritz versions of this conversation differ as to numerous particulars; the summary given in the text is consistent with both versions except that Kobritz denies that McGee said he had agreed to relinquish the franchise to Eshbach. For two reasons, the Court credits McGee's testimony that he did tell Kobritz of his agreement to relinquish the franchise.

First, Kobritz asserts that had he been told before the International League meeting of McGee's intent to relinquish the franchise, he (Kobritz) "would not have gone through with the approval meeting on that date." Yet Kobritz acknowledges that McGee told him before the meeting that the Eastern League had turned down a $100,000 cash offer, that there was no definite agreement on whether the Eastern League would accept a higher figure or on whether NBI could itself offer a higher figure, that the Eastern League had locations other than Maine where it would like to place a Double-A franchise, and that the Eastern League *was demanding* that NBI relinquish the Double-A franchise. In spite of this uncertainty, at the outset of the International League meeting Kobritz proceeded to ask the International League to approve the transfer.

It was not until later in the meeting that McGee said he felt he had satisfied the Eastern League's claim and that one James Baumer of the Philadelphia Phillies announced the Phillies' willingness to contribute money to enable NBI to reach a monetary settlement with the Eastern League. (The Phillies wanted a Triple-A franchise in Pennsylvania with which to affiliate and thus were willing to help NBI in its effort to acquire

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Cooper opened the September 9 meeting by saying that the league was going to vote on the transfer of the Maine franchise from Old Orchard Beach to Scranton. He

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such a franchise for Scranton.) Kobritz claims he understood the McGee and Baumer comments to mean that, in the time between Kobritz's and McGee's breakfast meeting and the International League meeting, Baumer had agreed to contribute enough money so that McGee could tell the International League that he had satisfied the Eastern League's claim. But the Court does not find plausible Kobritz's *post hoc* interpretation of these remarks, because Kobritz twice testified that he was unsure whether McGee had said he had already *offered* $250,000 or whether McGee said he thought the Eastern League would *accept* $250,000. Even if the Court did not find as fact (as it does) that McGee actually told Kobritz the Eastern League had rejected his $250,000 offer, Kobritz's acknowledged uncertainty over whether the Eastern League would accept $250,000 (or any cash settlement) makes it unlikely that Kobritz interpreted the McGee and Baumer comments alone as a sure sign that there would be a cash settlement with the Eastern League. And Kobritz does not suggest that he believed McGee had called Eshbach and reached a firm cash settlement at any time before or during the International League meeting. Nor did Kobritz at any time ask McGee to explain his comment that he had satisfied the Eastern League.

The Court therefore finds that by the time the International League voted on the transfer of the Triple-A franchise, Kobritz knew or reasonably should have known of the possibility that the Eastern League would insist on relinquishment and refuse to accept cash. Kobritz nevertheless did not ask the International League to disapprove the transfer, postpone the vote, or make the approval contingent on a successful cash settlement with the Eastern League. The McGee/Baumer comments at the International League meeting and Kobritz's lack of reaction to them are therefore more consistent with McGee's version of the breakfast meeting than with Kobritz's version.

Second, both McGee and Cooper testified, and the Court has found as fact, that McGee told Cooper just prior to the International League meeting that McGee had agreed to relinquish the Double-A franchise to the Eastern League. McGee

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then turned the meeting over to Kobritz who said that the parties had "in effect, worked out an arrangement that is, I think, satisfactory to both parties individually and now I think it's a matter that is in order for presentation to the league for its approval." Cooper raised the issue of territorial rights over Scranton by saying that the league believed Scranton to be open territory but that "whatever might happen between Scranton and the Eastern League is their business, not the International League's business." He insisted that the league include in its motion approving the sale a provision that the International League would be held harmless for any claims or damages that arise and that NBI assume any such liability. McGee, in response to questioning by Cooper, indicated that he believed that he had satisfied the Eastern League; Kobritz remained

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testified, and the Court has found, that Cooper agreed not to raise the relinquishment matter at the International League meeting because in his view it was a private matter between McGee and Kobritz. Cooper's conduct at the International League meeting corroborates these findings; twice, in response to direct questions to Kobritz about whether he was getting the Double-A franchise, Cooper tried vigorously to steer the meeting away from any discussion of the subject. The Court finds it unlikely that McGee, if he had wanted to conceal from Kobritz his agreement to relinquish the franchise, would have told Cooper of his agreement to do so; the risk to McGee that Cooper might then tell Kobritz would be too great. It may be, as Kobritz testified, that before the meeting Cooper mentioned to Kobritz his understanding that the Eastern League was asking for money, without mentioning the Eastern League's demand for relinquishment. But what Cooper may in fact have told Kobritz did not alter the risk to McGee that Cooper, knowing McGee had agreed to relinquish, might mention this to Kobritz, whether before, during, or after the International League meeting. It thus appears likely that McGee told Kobritz as well as Cooper of his agreement to relinquish the franchise.

silent throughout this conversation. The terms of the agreement between Kobritz and McGee were never discussed and Kobritz's initial statement that the parties had "worked out an arrangement . . . that is in order for presentation to the league for its approval" was never modified or contradicted. Immediately after the vote approving the assignment (upon McGee's request, to MPSA rather than NBI), the league members voted to move the franchise from Maine to Scranton. Kobritz, who still had not indicated that his deal with McGee was anything less than final, did not make any comment at this point suggesting that it was premature to move the franchise because he was still the owner. The league then turned to a discussion of the 1987 schedule and it was suggested that they might approve a schedule as early as October. Kobritz did not speak up at this point and state that his deal was not final and that, therefore, scheduling should be delayed until it was certain who would own the eighth franchise. Cooper referred to the Scranton representatives as the "new owners" and Kobritz did not object to this designation. Kobritz did, however, respond to an invitation to attend the league's next meeting in late September by mentioning that he wouldn't be a member "beyond that date," suggesting that he, at least, considered himself to still be a member.

Eshbach attended the NBI board meeting on the evening of September 10. He told the board that the Eastern League would only approve NBI's elevation to Triple-A if NBI relinquished the Double-A franchise to the Eastern League as indemnification. Eshbach said that if NBI refused to agree, there would be a lengthy appeal to the National Association. Without offering any specific amounts,

NBI board members asked if the Eastern League would accept a cash settlement; Eshbach responded in the negative, explaining that the league wanted the Double-A team to either stay in Scranton or be relinquished to the league. When asked if the league would approve the transfer to Kobritz, Eshbach responded that the league would not approve the transfer to anyone. Eshbach also told the NBI board that both he and National Association president Johnson considered Scranton to be Eastern League territory. Neither Eshbach nor McGee raised the issue of the Eastern League's demand to be held harmless in case of a lawsuit by Kobritz or the Limited Partnership. Eshbach then left the meeting and there was further discussion, little or none of which focused on NBI's contractual obligations to Kobritz or the Limited Partnership. McGee reported that Cooper viewed Scranton as open territory, but McGee pushed for a decision that evening. The NBI board then voted to relinquish the Double-A franchise and to waive its right to a determination of whether Scranton was Eastern League territory, both contingent upon NBI's acquisition of the Triple-A franchise by October 21, 1986. The board also authorized McGee to make additional agreements with the Eastern League; McGee wanted this authority in the event that Eshbach renewed his demand for a "hold harmless" agreement.

On September 11, McGee hand-delivered a letter to Eshbach reciting his understanding that the Eastern League had refused to accept a cash settlement or to approve the transfer of the Double-A franchise to anyone other than the Eastern League itself. Although specifically refusing to admit that Scranton was Eastern League territory, the letter stated that NBI accepted what it char-

acterized as the Eastern League's "offer" of permission to operate a Triple-A franchise in exchange for relinquishment of the Double-A franchise (contingent upon a successful closing with the Limited Partnership on October 21, 1986) and waiver of NBI's right, through litigation or arbitration, to obtain a determination of the territorial rights and indemnification questions.

McGee then called Kobritz and told him that the NBI board had agreed to relinquish the Double-A franchise to the Eastern League; McGee read Kobritz the letter that McGee had just given to Eshbach. McGee later sent a copy of the letter to Kobritz, who called McGee back on September 16 and said that based on McGee's letter, their deal was off.

On September 22, McGee and Eshbach entered a written agreement on behalf of NBI and the Eastern League. The Eastern League granted permission to NBI to elevate to Triple-A and enter the International League; the Eastern League waived its claim to territorial rights in Scranton. In exchange, NBI agreed to relinquish its Double-A franchise to the Eastern League and it waived its right to litigate or seek arbitration on the question of whether Scranton was Eastern League territory. NBI also waived its right to seek damages or specific performance, through litigation or arbitration, "based on the Eastern League's Board of Directors' refusal to approve the ownership transfer of [NBI's] franchise to any party or entity other than the Eastern League." Finally, NBI agreed to indemnify the Eastern League against claims by third parties based on the league's actions with respect to the transfer. The entire agreement was made contingent upon

NBI's acquisition of a Triple-A franchise and full payment therefor by October 21, 1986, failing which the agreement would be null and void.

Kobritz had no contact with the International League between September 9 and September 22. Although he had frequent contact with McGee during this period, and told McGee that there would be no deal without the transfer to him of the Double-A franchise that he now knew McGee had agreed to surrender to the Eastern League, Kobritz gave the International League absolutely no information about the developing crisis. On September 22 and 23, the International League met in Las Vegas. Kobritz waited until Cooper had entered the meeting room before telling him that there were serious problems with the Scranton deal, that he was still the owner of the franchise, and that he wanted to vote at the meeting. This was the first time that Cooper was informed by any party that the sale had not yet occurred and might in fact not go through. Cooper expressed to Kobritz his view that Kobritz was no longer a member of the league and therefore could not vote. Kobritz attended the two-day meeting, spoke on several issues, including an insurance issue that he believed was of importance to league members, but did not raise the matter of his dispute with McGee or whether or not he should still be able to vote as a league member.[12]

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[12]Kobritz claims that Cooper forbade him from raising during the meeting his claim that he had a right to vote. Cooper denies this. The Court concludes, after reviewing the testimony of Cooper, Kobritz, and league vice-president David Rosenfield, and after reviewing a verbatim transcript of the September 9 meeting, at which Cooper's attempts to move the discussion away from certain topics were by persuasion rather than injunction and were largely unsuccessful, that Kobritz could have raised the issue if he had chosen to do so.

Kobritz approached Cooper after the final adjournment of the meeting on September 23, and requested that he reconvene the meeting so that he could place on the record his position that he was still a member of the league. Cooper declined to do so, saying that at least one member of the league had left town or was in the process of leaving and that, in any case, McGee had sent a representative (NBI employee Bill Terlecky) to the meeting and was not present himself and that McGee should be present for any discussion of membership rights. Cooper did, however, offer to call a special meeting at which all parties would be present and the issue could be discussed.

On September 25, Kobritz sent a letter to Cooper in which, for the first time, he gave written notice that there had not yet been a sale to Scranton and that he still considered himself to be a league member and entiled to the privileges that attach to such a status. Cooper responded by calling Kobritz and renewing his offer to call a special meeting to discuss the matter. Kobritz responded by saying that he would think the offer over, but he later called Cooper and rejected it. On September 26, Cooper called McGee and asked him if he had an agreement with Kobritz; McGee replied that he did. Cooper asked McGee for a copy of the agreement and McGee sent one a few days later. When Cooper received the copy on October 1, it was the first time he learned of the actual terms of the arrangement and of the designated closing date.

On September 26, Kobritz again told McGee that unless NBI transferred the Double-A franchise at the October 21 closing, the Limited Partnership would not transfer the Triple-A franchise.

On October 20, NBI assigned to MPSA the September 3 agreement between NBI and the Limited Partnership with the proviso that NBI retained the right to enforce the agreement. NBI executed the assignment because it believed that the bond issue through which the new stadium was being constructed required that MPSA own a baseball franchise. In consideration of this assignment, MPSA assumed all of NBI's existing financial obligations relating to advanced ticket sales. MPSA and NBI agreed that NBI would actually operate the Triple-A franchise once acquired.

On October 21, McGee appeared at the scheduled closing, prepared to close under the alternative cash provision of the September 3 agreement between NBI and the Limited Partnership. McGee brought with him the closing documents that he had prepared on behalf of MPSA. When informed that no Double-A franchise would be transferred, Kobritz's attorney stated that the Limited Partnership would not transfer the Triple-A franchise, and the meeting ended.

On October 21, after the aborted closing, Kobritz called Cooper. Cooper advised Kobritz to request a special meeting of the league and request that the league rescind its action of September 9; he proposed that at such a meeting the league could hear all interested parties, examine documents, and decide who owned the franchise and whether a league vote of rescission was proper. Cooper said that under the circumstances a league meeting that had been called for Scranton would be moved to another city.

The following day Kobritz called Cooper and said that he would not request a special meeting because he was

not being treated as a member of the league and therefore he did not have to comply with the league constitution. He reiterated his position that he felt that he was still a member. Cooper responded that he had decided to cancel the November meeting altogether and delay any league business until the winter meetings in December, thereby giving the parties to the contract dispute more time to work out a settlement. On October 30 Kobritz wrote to Cooper, informing him that he was filing suit against the league "to require the International League to seat Maine as a league member at the winter meetings in Hollywood, Florida on December 7, and to require the league to include Maine in the 1987 league schedule." Cooper responded with a letter on November 3, expressing his hope that the matter could be resolved prior to the Florida meetings and stating that he had suggested to Kobritz in early October that Kobritz request a special meeting for the purpose of voting to rescind the action of September 9. He stated that in his opinion the minutes of the September 9 meeting were perfectly clear as to Kobritz's request that the league approve the sale and transfer of the Maine franchise to Scranton.

On November 26, Kobritz wrote to Cooper and requested that he be seated at the December 7 International League meeting in Florida. On December 1, Cooper wrote to Kobritz and indicated that he would be treated as a league member should he prevail in court in his contract dispute with Northeastern Baseball; on December 2, Cooper sent Kobritz copies of all information that had been mailed to International League members since the special meeting of September 9. Kobritz attended the winter meetings in Florida and was encouraged to comment on any issues of concern to him but was not allowed to vote.

The schedule drafted at that meeting was designed to accommodate whichever party prevailed in the contract dispute.

CONCLUSIONS OF LAW

I. *Personal Jurisdiction Over MPSA*

Before trial, MPSA moved that all claims against it be dismissed on the ground that this Court lacks personal jurisdiction over it. With the consent of all parties, and to obviate the need for a separate evidentiary hearing, the Court reserved its ruling on this motion until after trial. Based on the evidence introduced at trial and the foregoing findings of fact, the Court now denies MPSA's motion.

Both the First Circuit and this Court have recently reviewed in depth the principles governing personal jurisdiction in diversity cases. *See Nicholas v. Buchanan*, 806 F.2d 305 (1st Cir. 1986); *Terry L. Hopkins, Inc. v. Activation, Inc.*, 647 F.Supp. 748 (D. Me. 1986). For present purposes, therefore, a brief review of those principles will suffice. Once the Court's personal jurisdiction is challenged, the burden is on the Plaintiff to establish that jurisdiction is proper; a showing of personal jurisdiction must be based on specific facts set forth in the record, which is to be construed in the Plaintiff's favor. The limits of personal jurisdiction under Maine's long-arm statute, Me. Rev. Stat. Ann. tit. 14, § 704-A (1964), are co-extensive with federal due process requirements. The Court must therefore determine whether the assertion of personal jurisdiction over MPA is authorized by Maine's long arm statute and is consistent with due process. This latter question involves a three-step inquiry: (1) whether MPSA

has contacts with Maine; (2) whether the claims against MPSA relate to these contacts; and (3) if so, whether the relationship among MPSA, Maine, and the litigation forms a fair and reasonable foundation for the exercise of jurisdiction over MPSA. *See Terry L. Hopkins, Inc.*, 647 F. Supp. at 750.

Plaintiffs appear to assert that this court has long-arm jurisdiction under sections 704-A(2)(A) (transaction of business within Maine) and 704-A(2)(B) (causing the consequences of a tortious act to occur within Maine) of the long-arm statute. The Court agrees that long-arm jurisdiction is available under either of these provisions.

The Court concludes, first, that MPSA transacted business within Maine. The Court has found as fact that McGee was solicitor of the MPSA as well as president of NBI; McGee never clearly distinguished between his two roles during his dealings with Kobritz, the Limited Partnership, or the International League. MPSA was always intended as the ultimate owner of the Triple-A franchise; McGee and NBI thus acted as MPSA's agents in purchasing the franchise in Maine. During McGee's June, 1986 visit to Portland, McGee discussed his intentions with regard to the stadium to be built by MPSA in Scranton. McGee told Kobritz to announce at his August 29 press conference that the Triple-A franchise was being sold to MPSA. During McGee's September 3 visit to Portland, he showed Kobritz documents indicating MPSA's involvement in financing the deal. After NBI, on October 20, assigned to MPSA the agreement with the Limited Partnership, McGee returned to Maine for the October 21 closing, bringing closing documents prepared by him specifically on behalf of MPSA. MPSA's assertion that Mc-

Gee had no authority to act on its behalf while in Maine is simply specious.

Other events not occuring in Maine support the conclusion that Kobritz reasonably believed the transaction concluded in Maine involved MPSA as well as NBI. At the September 9 International League meeting in Rochester, New York, McGee made clear in Kobritz's presence that he represented both NBI nad MPSA, that MPSA would own the Triple-A franchise, and that the International League should (as it did) approve the transfer to MPSA rather than to NBI.

The Court concludes, second, that MPSA committed acts that caused possibly tortious consequences within Maine. Plaintiffs' claim that MPSA converted their property is premised on MPSA's actions at International League meetings on September 22-23 and December 8 occurring outside of Maine. Because the International League had approved the transfer to MPSA rather than NBI, McGee's and NBI employee Bill Terlecky's participation in these meetings was clearly on behalf of MPSA. If MPSA's assertion of membership rights was tortious, then it interfered with the property rights of the Limited Partnership and/or its partners—rights that, if located anywhere, were located in Maine.

The foregoing is sufficient to establish that MPSA had contacts with Maine and that Plaintiffs' contract and conversion claims against MPSA relate to these contacts. The Court also concludes that Plaintiffs' fraudulent conveyance claim against MPSA relates to these contacts, because the conveyance grows out of MPSA's contacts with Maine in its capacity as the intended ultimate owner of the

Triple-A franchise being purchased in Maine. The Court also concludes that MPSA's contacts with Maine relate to the claims asserted against MPSA by the International League; although these two entities had no actual contacts with each other that occurred in Maine, the claims all grow out of the agreement concluded in Maine for the transfer of the Triple-A franchise and the activities in Maine of the other parties, including MPSA.

The remaining question in the due process analysis is whether the relationship among MPSA, Maine, and this litigation forms a fair and reasonable foundation for the exercise of jurisdiction over MPSA. The Court has no difficulty in concluding that this standard is satisfied. MPSA's agents came to Maine in an effort to purchase the Triple-A franchise; this litigation grows directly out of those efforts. MPSA thus purposely availed itself of the privileges and protections of Maine law and could reasonably anticipate being haled into a court acting pursuant to personal jurisdiction authority conferred by Maine law. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980); *Nicholas v. Buchanan,* 806 F.2d 305, 307 (1st Cir. 1986). The Court therefore denies MPSA's motion to dismiss the claims against it for want of personal jurisdiction.

II. *Admissibility of Parol Evidence*

At trial the Court admitted *de bene* testimony and documentary evidence relating to the interpretation of the two agreements at issue: the September 3 agreement between NBI and the Limited Partnership and the September 4 side agreement between NBI and Kobritz individually. Defendants NBI and MPSA were granted a continuing

objection on relevance grounds to all testimony offered by Plaintiffs regarding the parties' intentions in entering these two agreements. The Court also indicated at the time that Plaintiffs would be granted a continuing objection to all such testimony offered by NBI and MPSA. Finally, Defendants objected to the admission of the superseded September 3 side agreement between NBI and Kobritz individually. The Court must now determine whether parol evidence is admissible for the purpose of interpreting either of the two agreements at issue.

The question before the Court is whether either the September 3 main agreement or the September 4 side agreement is ambiguous. Contract language is ambiguous when it is reasonably susceptible of different interpretations; once an ambiguity is found, extrinsic evidence may be admitted and considered to show the intention of the parties, and the interpretation of the ambiguous language is a question of fact. *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1387 (Me. 1983); *see Restatement (Second) of Contracts* § 212(2) (1979) (stating that interpretation of an integrated agreement is a question of fact if it depends on the credibility of, or the choice among, reasonable inferences to be drawn from, extrinsic evidence).

The Court agrees with Plaintiffs that the September 3 main agreement is ambiguous. That agreement provided that if "the Eastern League . . . shall refuse to approve the sale" of the Double-A franchise to the Limited Partnership, the agreement remained in full force and effect with the modification that the price of the Triple-A franchise would be reduced from $2.4 million to $2 million. But nowhere does the agreement define the term "refuse

to approve the sale"; the parties clearly attach different meanings to this term.

Plaintiffs assert that the agreement contemplates a process in which the league directors meet, hear a presentation by Kobritz as to the merits of the proposed transfer, ask any questions they may have, and then conduct a formal vote on whether to approve the sale. In Plaintiffs' view, only a negative vote on the merits of the sale would constitute a "refus[al] to approve the sale" within the meaning of the September 3 agreement. Although Plaintiffs place some emphasis on the approval *process,* their primary focus is on the *reason* for nonapproval.

NBI asserts that no such formal process or decision on the merits was required. NBI contends that representations by the league's president and some directors that they *would* refuse to approve the sale, and/or a refusal by the league directors (pursuant to a telephone poll) to *consider* approving the sale, and/or the mere recitation in the September 22 agreement between NBI and the Eastern League that the league's board of directors refused to approve the sale, are sufficient to constitute "refus[al] to approve the sale" within the meaning of the September 3 agreement. NBI thus sees no requirement of a particular approval process or a particular reason for nonapproval; in NBI's view, any failure to approve would constitute a "refus[al] to approve the sale."

Because the term "refuse to approve the sale" is reasonably suceptible of these different interpretations, extrinsic evidence is admissible to show the intent of the parties. The Court also notes that even if the term "refuse to approve the sale" were not ambiguous, considera-

tion of extrinsic evidence is permissible to explain (although not to vary or contradict) the term, in order to understand the parties' obligations, and would be admissible for that purpose.

The September 4 side agreement is also ambiguous, in that it refers to "best efforts to obtain Eastern League approval" and to the possibility that "the Eastern League shall fail to approve the purchase" or may "den[y] approval." Extrinsic evidence is therefore admissible to clarify the parties' intent with respect to this ambiguity. Extrinsic evidence is also admissible to explain the terms "best efforts to obtain Eastern League approval," "fail to approve," and "den[y] approval."

The final parol evidence question relates to Kobritz's motivation for entering the two agreements at issue. Defendants offered evidence in support of their contention that Kobritz and/or the Limited Partnership never really wanted a Double-A franchise. The recitals to the main September 3 agreement establish, however, that the Limited Partnership was "desirous of acquiring" NBI's Double-A franchise and that NBI was desirous of selling same" to the Limited Partnership. The recitals to the September 4 side agreement establish that Kobritz and NBI had knowingly agreed to use their best efforts to obtain Eastern League approval of the transfer of the Double-A franchise to the Limited Partnership. These recitals unambiguously establish the parties' understanding that Kobritz and the Limited Partnership wanted to acquire the Double-A franchise. Defendants seek not to explain or clarify any ambiguity in this understanding but to contradict it directly; parol evidence may not be given effect for that purpose.

III. *Plaintiffs' Claims Against NBI*

Counts I, II and III of Plaintiffs' claims against NBI all revolve around NBI's asserted duties to act in good faith and to convey the Double-A franchise to the Limited Partnership. The Court will consider the existence of these duties, whether NBI repudiated (Count I) or breached (Count II) them, and whether the September 3 agreement terminated by its own terms (Count III). The Court will then consider whether NBI converted the Triple-A franchise (Count IV) and, finally, whether NBI breached its September 4 side agreement with Kobritz (Count V).

A. *Repudiation, Breach, and Termination of the September 3 Agreement*

1. *Good Faith*—Although the Maine Law Court has not confronted the question, this Court has previously assumed that Maine law imposes a general duty of good faith on the parties to a contract. *United States v. H&S Realty Co.*, 647 F. Supp. 1415, 1424 (D. Me. 1986); *Reid v. Key Bank of Southern Maine, Inc.*, Civ. No. 85-0088-P, slip op. at 5 (D. Me. Jan. 7, 1986).[13] Although the Uniform Commercial Code does not govern this contract, its definition of good faith as "honesty in fact" is relevant here. *See* Me. Rev. Stat. Ann. tit. 11, § 1-201(19) (1964). Also relevant is *Restatement (Second) of Contracts* § 205, comment

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[13]The Court is aware that the judgment in *Reid* is currently on appeal to the Court of Appeals for the First Circuit. In view of the Court's conclusion that NBI acted in good faith, a determination that Maine law does not impose a general duty of good faith on the parties to a contract would not affect the outcome of the instant case.

e (1979), which declares that subterfuges, evasions, and inaction may constitute bad faith in the performance of a contract and that fair dealing may require more than honesty. Finally, the Maine Law Court has defined good faith, although not in the contractual context, as actions taken "honestly, without fraud, collusion, or deceit; really, actually, without pretense." *Waugh v. Prince,* 121 Me. 67, 70, 115 A. 612 (1921) (citation omitted).

Based on the findings of facts set forth above, the Court concludes that NBI acted in good faith throughout the transaction with the Limited Partnership. As early as July, 1986, McGee told Kobritz of the possibility of a dispute over Eastern League territorial rights to Scranton. On September 3, before any agreement was signed, McGee showed Kobritz a copy of his letter to Eshbach discussing the dispute. On September 4, at the time the side agreement was signed, McGee had no inkling that the Eastern League would insist that NBI relinquish its Double-A franchise; he believed in good faith that the dispute could be settled with cash, and he had not led Kobritz to believe otherwise. On September 9 McGee told Kobritz that, although he still hoped the Eastern League would accept a cash settlement, he had agreed to relinquish the franchise in order to open up the Scranton territory in time for the International League meeting. On September 11, McGee told Kobritz that the NBI board had agreed to relinquish the franchise. Thereafter McGee never concealed from Kobritz the fact that he would not convey the Double-A team at the closing. McGee did not engage in subterfuges or evasions; he attempted in good faith and without pretense to obtain Eastern League approval of the transfer.

NBI therefore neither repudiated nor breached its obligation of good faith toward the Limited Partnership.

2. *Conveyance of the Double-A Franchise*—Plaintiffs contend that the Eastern League never "refuse[d] to approve the sale" of the Double-A franchise within the meaning of the September 3 agreement. Plaintiffs claim that NBI therefore had a duty to convey the franchise to the Limited Partnership. As noted above, the phrase "refuse to approve the sale" is ambiguous in that it could require a formal vote by the league directors disapproving the sale on its merits, or be satisfied by other, less formal league actions or omissions resulting in nonapproval. The resolution of this ambiquity requires consideration of parol evidence.

The August 20 draft agreement expressly made Eastern League approval a condition precedent of the entire agreement; Eastern League approval was one of the "foregoing conditions" the nonoccurrence of which would terminate the agreement and require the refund of NBI's $100,000 deposit plus interest. Under this draft agreement, neither party assumed the risk of any sort of Eastern League nonapproval; neither party obligated itself to perform in case of such nonapproval. Both Kobritz and McGee assumed that the Eastern League would follow its usual formal procedure for approving the transfer of a franchise; both assumed that the league would grant its approval.

By September 3, a new concern had arisen regarding Eastern League approval: the existence of dissent among Kobritz's limited partners. Both Kobritz and McGee were familiar with the Eastern League's usual procedure for

considering proposed franchise transfers; as of September 3 both still expected that the league's directors would meet on September 6, listen to a presentation by Kobritz, ask questions, and then vote either to approve or disapprove the transfer. The only possible basis contemplated by either party for the Eastern League's refusal to approve the transfer was the existence of dissent among Kobritz's limited partners. Neither Kobritz nor McGee had any reason to suspect that the Eastern League would refuse to consider the transfer or that without formal consideration of the merits of the transfer, Eshbach would sign an agreement with NBI reciting that the directors refused to approve the transfer.

By inserting the "refuse to approve" language into the September 3 agreement, the parties thus changed slightly the allocation of risk as compared to the August 20 draft agreement. The Limited Partnership now assumed the specific risk that the Eastern League would consider and reject the transfer on its merits; in this event the Limited Partnership nevertheless obligated itself to convey the Triple-A franchise for the reduced price of $2 million. As both parties understood, the Limited Partnership was willing to assume the risk of this particular sort of Eastern League nonapproval for one reason and one reason only: that such nonapproval left open the possibility of Eastern League approval of the transfer to Kobritz individually. But the parties never shifted to the Limited Partnership the risk that an entirely unrelated dispute between NBI and the Eastern League would prevent the Eastern League from considering the merits of the transfer either to the Limited Partnership or to Kobritz individually. As under the August 20 draft agree-

ment, neither party assumed the risk of this sort of Eastern League nonapproval; neither party obligated itself to perform in case of this sort of nonapproval.

The Court therefore agrees with Plaintiffs that the Eastern League did not "refuse to approve" the transfer within the meaning of the September 3 agreement. The Limited Partnership thus had no duty to convey the Triple-A franchise for the reduced price of $2 million. Neither, however, did NBI have a duty to transfer the Double-A franchise plus $2.4 million; the September 3 agreement expressly stated that "the transfer of the Double-A franchise is subject to the approval of the Eastern League," and the nonoccurrence of this condition discharged NBI's duty. (NBI thus neither repudiated nor breached an obligation to convey the Double-A franchise, as Plaintiffs claim in Counts I and II.) This in turn discharged the Limited Partnership's duty to transfer the Triple-A franchise plus $400,000. *See Lynch v. Stebbins*, 127 Me. 203, 205, 142 A. 735 (1928).

Put another way, an implied-in-fact condition precedent of the September 3 agreement was that the Eastern League would either approve or refuse on the merits to approve the transfer of the Double-A franchise to the Limited Partnership. The parties' exact duties would have differed depending on which of these events occurred, but one or the other was required to occur in order to obligate the Limited Partnership to perform its promise to convey the Triple-A franchise. It is perfectly evident that the parties did not intend their agreement as an open-ended gamble on any and all forms of Eastern League action. They did not contemplate that the Eastern League would

demand the franchise for itself and decline even to give Kobritz a hearing. Rather, the parties obligated themselves to perform only if the Eastern League considered the proposed transfer in its usual manner and approved or "refuse[d] to approve" the transfer on the merits. Because this implied-in-fact condition precedent did not occur, the agreement terminated by its own terms and the Limited Partnership must return the $100,000 deposit with interest accrued thereon in accordance with paragraph 14 of the agreement.[14]

In view of this conclusion there is no need to discuss NBI's defenses or counterclaims or to determine the extent of the financial injury, if any, suffered by either Plaintiffs or NBI.

B. *Conversion*

Plaintiffs' Count IV asserts that NBI converted the Triple-A franchise by wrongfully exercising membership rights in the International League without holding title to the franchise. Conversion is "any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it . . . ." *La Verriere v. Casco Bank & Trust Co.*, 155 Me. 97, 99, 151 A.2d 276 (1959). Plain-

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[14]This result might also be supported on the theory that performance became impracticable or impossible because of the occurrence of an event—Eastern League refusal to consider the merits of the transfer—the nonoccurrence of which was a basic assumption on which the agreement was made. *See Cohen v. Morneault*, 120 Me. 358, 114 A. 307 (1921); *Restatement (Second) of Contracts* § 261 (1979); *cf.* Me. Rev. Stat. Ann. tit. 11, § 2-615 (1964). But neither party raised this defense to the other's suit on the agreement, and so the Court does not decide that question.

tiffs rely on *Restatement (Second) of Torts* § 242(2) (1964), which declares that "[o]ne who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted." Maine law apparently recognizes that intangible rights may be converted. *See Northeast Bank of Lewiston & Auburn v. Murphy*, 512 A.2d 344 (Me. 1986) (holding insurer and attorney liable for converting bank's lien rights in proceeds of settlement of a lawsuit; not citing *Restatement* § 242(2)); *Ocean Nat'l Bank of Kennebunk v. Diment*, 462 A.2d 35 (Me. 1983) (holding bank liable for converting 200 shares of stock; not citing *Restatement* § 242(2)). The Court is skeptical as to whether baseball league membership rights are "customarily merged in a document"; even assuming *arguendo* that they are so merged, no conversion occurred.

A preliminary question arises as to whether NBI actually exercised International League membership rights; the league, after all, recognized MPSA rather than NBI as a member. But NBI and MPSA had agreed that NBI would operate the team of MPSA's behalf; NBI employee Terlecky exercised membership rights at the September 22-23 league meetings, and McGee (whether in his capacity as solicitor of MPSA or president of NBI, or both, the evidence does not clearly show) exercised membership rights at the December 8 league meeting. These facts demonstrate that NBI exercised membership rights as an agent for MPSA.

But the mere exercise of the rights of another is insufficient to constitute conversion. When a party has

rightfully come into possession of intangible rights, no conversion has occurred unless and until the party entitled to those rights has demanded their return and the party in possession has refused. *Cf. General Motors Acceptance Corp. v. Anacone,* 160 Me. 53, 83, 197 A.2d 506 (1964); *Restatement (Second) of Torts* § 237 (1964); W. Prosser, *Law of Torts* 89 (4th ed. 1971). In the instant case, MPSA rightfully came into possession of the right to *act* as a league member at International League meetings. At Kobritz's request, the International League on September 9 approved the assignment of membership to MPSA. Although (as explained more fully *infra*) no transfer of membership occurred at this time, Kobritz voiced to MPSA no objection to MPSA *acting* as if it had already replaced the Limited Partnership as a league member.[15] In other words, although MPSA did not yet hold membership rights, Kobritz's actions privileged MPSA to exercise the Limited Partnership's membership rights. Until such time as Kobritz demanded that MPSA cease exercising these rights and MPSA refused, no conversion occurred. Because there is no evidence that Kobritz ever made such a demand of MPSA or that MPSA refused it, MPSA did not commit conversion. The same applies to NBI as MPSA's agent.

Even if the Limited Partnership's refusal to convey the Triple-A franchise at the October 21 closing constituted

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[15]Kobritz went so far as to ask MPSA representative Terlecky, at the September 22-23 meeting, for *permission* to vote on the "Executive of the Year" award for the season just concluded. Kobritz thus could have appeared to MPSA to feel that, although no actual transfer of membership would occur until the October 21 closing, MPSA might as well begin to act as a league member on matters relating to preparations for the upcoming 1987 season.

an implied revocation of MPSA's privilege to exercise the Limited Partnership's membership rights, that implied revocation did not amount to an actual demand that MPSA cease exercising those rights. Moreover, had such a demand been made, MPSA might plausibly have made a qualified refusal to cease exercising league membership rights until such time as it could be determined who was entitled to exercise those rights. *See Restatement (Second) of Torts* § 240 (1964). If the Limited Partnership's October 21 filing of its complaint in this action constituted a demand, surely NBI's and MPSA's answers were qualified refusals.

Concepts such as demand, refusal, and qualified refusal, developed to resolve disputes over tangible goods, may seem out of place in this dispute over intangible rights. This incongruity, however, grows not out of any outmoded adherence to the technicalities of the common law but rather out of Plaintiffs' decision to plead conversion instead of other causes of action better suited to this controversy. *See generally id.* § 242, comment e (stating that 'conversion' of intangible rights "does not accord very well with the traditional common law limitations of conversion").

C. *Breach of September 4 Side Agreement*

Plaintiffs' Count V asserts that NBI's bad faith and failure to use its best efforts to obtain Eastern League approval constitute breaches of the September 4 side agreement. The Court has already determined that NBI did not act in bad faith. And there is no strict need to determine whether NBI breached its obligation to exert

its best efforts, because the September 4 side agreement was expressly contingent upon NBI's acquisition of the Triple-A franchise pursuant to the September 3 agreement with the Limited Partnership. Moreover, the side agreement was only to become effective if the Eastern League "fail[ed]" to approve the transfer; the Court has found that by this term the parties meant "refuse to approve on the merits," and such a refusal never occurred. The nonoccurrence of these conditions excused NBI's duty to perform the obligations created by the September 4 side agreement, and Plaintiffs cannot recover on that agreement. *See Lynch v. Stebbins,* 127 Me. 203, 142 A. 735 (1928). The Court nevertheless believes it prudent to set forth its conclusion that NBI did not use its best efforts to obtain Eastern League approval of the transfer.

Defendants argue that their agreement to use best efforts is unenforceable because there is no defined standard with which to ascertain what the best efforts obligation entailed. But the case upon which they rely, *Pinnacle Books, Inc. v. Harlequin Enterprises Limited,* 519 F. Supp. 118 (S.D.N.Y. 1981), involved an agreement to use best efforts to negotiate another agreement. The court in that case found that that agreement to work toward such an uncertain goal was so vague as to be unenforceable. But the court was careful to note that "it is possible to infer from the circumstances the standard of performance required by a 'best efforts' clause where the parties have agreed to work toward a specific goal." *Id.* at 121-22 (citing cases).

Here, of course, the parties agreed to work toward the specific goal of obtaining Eastern League approval of the transfer. They may not have provided, for example,

that NBI was obligated to offer the Eastern League up to a specified sum of money in order to obtain approval, but the failure to supply this particular sort of objective standard does not prevent the Court from determining what reasonable persons in the same circumstances would consider to be best efforts. Best efforts is a term "which necessarily takes its meaning from the circumstances," *Perma Research & Development Co. v. Singer Co.*, 308 F. Supp. 743, 748 (S.D.N.Y. 1970). The term must be defined with reference to a party's experience, expertise, financial status, and other abilities, as well as the opportunities the party creates or faces. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 266, 267 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979). In view of the extensive evidence regarding NBI's experience with the Eastern League, the league's conduct in the instant case, and the factors prompting NBI to agree to relinquish the Double-A franchise, the best efforts obligation can be given sufficient meaning to create an enforceable standard.

The Eastern League's demand for franchise relinquishment was the principal obstacle to obtaining league approval of the transfer of the Double-A franchise to Maine. Because, as the following discussion indicates, McGee failed to use his best efforts to avoid relinquishing the franchise, it follows that McGee failed to use his best efforts to obtain such approval.

Although McGee used his best efforts to induce the Eastern League to accept a cash settlement, he did not use his best efforts to negate the other factors that led him to relinquish the franchise. McGee's belief that the Eastern League would not approve a transfer to Maine on the

merits did not justify relinquishing the franchise. McGee relied on the statements of Eshbach and, at most, one or two Eastern League directors, that Harrisburg, Pennsylvania was thought to be a more desirable location for an Eastern League franchise. Kobritz had not been given a chance to make a presentation to the Eastern League as a whole about the merits of Maine and of his own participation in the Eastern League. With one minor exception, no Eastern League director bore any personal animosity toward Kobrizt, and only one director had expressed any reservations about Maine. McGee thus did not use his best efforts to ascertain how the full Eastern League would vote on the merits of the requested transfer to Maine.

McGee's need to issue a "no threat of litigation" opinion letter in order to obtain the $2 million in public financing provided the principal impetus for his precipitate relinquishment of the franchise, but did not justify his doing so. There was no evidence that McGee needed to issue this letter until October 20, 1986, the date he actually did so. Between the date he agreed to relinquish the franchise, September 9, and the date he issued the letter, October 20, McGee had a full six weeks in which to seek a National Association determination of either or both of the key questions: whether Scranton was Eastern League territory and, if so, what was the proper measure of indemnification. McGee had no reason to believe that the National Association could not, if asked to do so, render a decision within that time, or to believe that the Eastern League would not abide by such a decision. Moreover, there was no evidence that the October 21 closing date was etched in stone. Kobritz had already agreed to McGee's

request to move the closing from September 14 to October 21. McGee could have asked Kobritz and the public financing authorities for an extension, but he did not do so, nor did he explore what right, if any, he had under Maine law to delay the closing date. McGee thus failed to use his best efforts to eliminate this source of pressure to reach a quick settlement with the Eastern League.

McGee's belief that it would be fruitless to seek a National Association determination because Johnson had already made up his mind did not justify relinquishing the franchise. The Court has found as fact that Johnson had told McGee on September 8 that *if* the facts were as he had been told, then no exception under Section 10.06 would be necessary to make Scranton Eastern League territory, and that somewhere in the National Association Agreement he (Johnson) *could* find authority to force relinquishment of a franchise and indemnification for a loss of territorial rights. But these statements do not establish reasonable grounds for McGee to believe that Johnson could not be swayed by McGee's presentation of his full case, nor do they establish that an appeal from an adverse decision by Johnson to the National Association Executive Committee would not produce a different result.[16] McGee

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[16]In fact, Section 10.06(b) of the National Association Agreement appears to provide that determinations as to territorial rights must be made by the president together with the Executive Committee, and Section 10.08(c) provides that determinations as to indemnification must be made by a five-member Board of Arbitration. Even if Johnson had demonstrated an intent to ignore the provisions and make both determinations himself, Sections 4.09(i) and 6.06(f) appear to permit such determinations to be appealed to the Executive Committee.

did not feel bound by the Eastern League's July, 1985 motion purporting to limit NBI's right to seek arbitration of the territorial rights question. Yet McGee never closely examined the National Association Agreement to determine whether the Eastern League's claim had any substantial foundation or to determine the procedures for National Association determination of such a claim.[17] McGee was aware that a demand for franchise relinquishment was unprecedented in minor league baseball. McGee, therefore, did not use his best efforts to confirm his perception that the National Association, if asked formally to determine the question, would require him to relinquish the franchise.

Nor was relinquishment justified by McGee's belief that he needed to resolve the Eastern League's territorial rights claim by September 9 in order to secure (by the September 11 date required by the contract) the International League's approval of the transfer of the Triple-A

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[17]Statements made at the International League meeting on September 9 also put McGee on notice that he could probably appeal to the Executive Committee any decision made by Johnson.

Had McGee examined the National Association Agreement, he might have noticed that NBI was not seeking to "elevate" within the meaning of that Agreement; "elevation" means to move a club from a Double-A league to a Triple-A league, whereas NBI was merely selling its Double-A club and obtaining a Triple-A club. McGee apparently never recognized this distinction until it was pointed out at trial by the Court. Had McGee examined the National Association Agreement, he might also have noticed that the agreement on its face does not require that a club obtain its league's approval to elevate, or to pay its league indemnification upon elevation. In short, McGee did surprisingly little to investigate the legal basis for the Eastern League's claim or directly to challenge the Eastern League's demand for franchise relinquishment.

franchise. McGee did not use his best efforts to secure such approval *without* relinquishing the franchise. McGee could have, but did not, explore with either Cooper or Kobritz the possibility of making International League approval contingent upon subsequent satisfactory resoluiton of the Eastern League's claim. (McGee had been present when the Eastern League had in 1984 approved franchise transfers on a contingent basis and thus he was no stranger to the concept.) Nor did McGee ask Kobritz to extend the September 11 deadline for International League approval in order to give McGee more time to resolve the Eastern League claim without relinquishing the franchise. McGee did not use his best efforts to eliminate the time pressure that led him to agree to relinquish the franchise on September 9.

In conclusion, McGee's failure to use his best efforts to avoid franchise relinquishment, the principle obstacle to obtaining Eastern League approval, necessarily means that McGee failed to use his best efforts to obtain such approval. The best efforts standard as articulated above did not require "Herculean" efforts, as NBI complains. An attempt to ascertain how Eastern League directors felt about the merits of the transfer to Maine, a request to Kobritz for more time, an examination of the National Association agreement, a request for a National Association determination of the two key issues, a request that the International League's vote to be a contingent one—these measures would have involved no great investment of time or money and were reasonably required of McGee under the contractual commitments of NBI. But in view of the nonoccurrence of two conditions of the September 4 agreement—that NBI acquire the Triple-A franchise and

that the Eastern League refuse on the merits to approve the transfer—Plaintiffs may not recover upon that agreement.

IV. *Plaintiffs' Claims Against MPSA*

Plaintiffs assert two claims against MPSA: conversion and fraudulent conveyance. The conversion claim has already been determined, *supra,* adversely to Plaintiffs. What remains is Plaintiffs' claim that the October 20 assignment from NBI to MPSA was fraudulent because (1) NBI had no property interest in the Triple-A franchise that it could assign, and (2) the conveyance was made for less than fair consideration. Plaintiffs seek an avoidance of the transfer and an injunction against MPSA's further exercise of the Limited Partnership's property rights, pursuant to the Uniform Fraudulent Transfer Act, Me. Rev. Stat. Ann. tit. 14, §§ 3571-3582 (Supp. 1986).

The October 20 assignment provided, in pertinent part, that NBI assigned to MPSA both the September 3 agreement with the Limited Partnership and, upon acquisition of the Triple-A franchise, NBI's interest in that franchise. Failing such acquisition, NBI assigned to MPSA its interest in the Double-A franchise, subject to Eastern League approval. Clearly, NBI assigned no greater interest in the Triple-A franchise that it was entitled to assign. Plaintiffs' first theory of fraudulent conveyance—that NBI actually assigned the franchise itself on October 20—is therefore without merit.

Plaintiffs' second theory, that the assignment was made for less than fair consideration, fails for lack of proof. The consideration for the assignment was MPSA's

assumption of "all financial obligations of NBI relating to the advance sale of tickets for games to be played by the Double-A or Triple-A franchise." Plaintiffs have not offered any specific evidence as to the monetary value of these obligations. Nor have they attempted to show the value at the time of the transfer on October 20 of NBI's interest in the September 3 agreement with the Limited Partnership—a value that was uncertain, to say the least, given the low apparent likelihood of a successful closing the following day. Nor have they attempted to show the value on October 20 of the assignment of the Double-A franchise, which assignment would only occur upon the failure to acquire the Triple-A franchise and moreover was subject to the approval of the Eastern League. This value was also highly uncertain, given the probable difficulties in acquiring Eastern League approval. Because Plaintiffs have not met their burden of proving that the assignment was for less than fair consideration, their fraudulent conveyance claim fails.

V. *Plaintiffs' Claims Against the International League*

A. *Failure to Abide by League Constitution*

Plaintiffs have asserted five claims against the International League. In Count I, Plaintiffs allege that the International League violated a duty to operate in accordance with its constitution. The International League argues that this pleading is impermissibly vague, but the Court disagrees. Counsel for the league admitted at trial that he understood that the count could be alleging a breach of contract, and the league itself has asserted a breach of contract claim based on Plaintiffs' alleged failure to comply with the league constitution. The Court

theferoe concludes that Plaintiffs' first count was stated clearly enough to avoid any prejudice to the league's rights.

The parties have stipulated that Virginia law applies to the "formation and corporate status" of the International League and that Maine law applies to all other issues. The Court concludes from this stipulation that any issues involving the interpretation of the league's constitution should be resolved under Virginia law, as the terms of the constitution are inextricably related to the formation and corporate status of the league, but that Maine contract law should govern all other aspects of the current dispute as any breach that occurred was not related to the formation or corporate status of the league. The Court notes, however, that it would reach the same result under either Virginia or Maine law.

Plaintiffs allege that the league has violated Article IV Section 1 of its constitution. It is well settled under Maine law that the constitution and bylaws of an organization such as the International League constitute an enforceable contract between the members and the organization[18] and govern their mutual rights and liabilities, provided that said rules are not unreasonable, illegal, or contrary to public policy. *See Bhatnagar v. Mid-Maine Medical Center,* 510 A.2d 233 (Me. 1986); *Gashgai v. Maine Medical Ass'n,* 350 A.2d 571 (Me. 1976); *Libby v. Perry,* 311 A.2d 527 (Me. 1973). Therefore, any violation of the constitution may also constitute a breach of contract.

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[18]The same is true under Virginia law. *See Gottlieb v. Economy Stores,* 199 Va. 848, 102 S.E.2d 345 (1958).

Article IV, Section 1 of the league constitution reads:

> Membership in this League may be assigned only upon the approval of five (5) members of the League, (exclusive of the assignor member), at an annual or special meeting of the League. Assignment of membership shall divest the assignor of, and vest in the assignee, all such assignor's right and interest in the League's assets. The assignee, upon accepting membership, must agree to be bound by the Constitution, By-Laws and Rules of this League.

International League president Cooper believed that under this provision, the league actually transferred membership when it voted to approve an assignment. The Court concludes that his interpretation, while held in good faith, is incorrect. The provision requires that the league *approve* an assignment before it can be valid, but it clearly contemplates that it is the member itself which has the exclusive power to do the actual assigning. The provision speaks of the "assignor member" and instructs that assignment "shall divest the *assignor* of, and vest in the assignee, all such *assignor's* right and interest in the League's assets." (Emphasis added.) The best interpretation of this language is that it is the outgoing member, and not the league, which is doing the actual assigning; the league's only role in the process is to grant its approval and thereby confer upon the member the power to effectively assign.

In a situation in which the assignee and assignor have actually executed an assignment that is contingent only upon league approval, then the league's vote will result in a membership transfer by causing the required condition precedent to occur. The league could reasonably have believed that this was the situation on September 9, given

Kobritz's comments at that time. However, there came a time, certainly no later than the receipt of the actual contract documents from McGee on October 1, when the league reasonably should have known that no assignment had occurred. At that point, all league actions inconsistent with Plaintiffs' membership rights, such as the league's failure to seat Plaintiffs at the winter meeting in Florida, constituted breaches of contract.

The Court disagrees with the league's contention that Plaintiffs are barred from bringing this action for failure to exhaust internal remedies. It has been the league's consistent position that, under Article IV of its constitution, the vote on September 9 divested Plaintiffs of their status as a league member. The league is therefore estopped from now claiming that Plaintiffs are bound to abide by the league's internal dispute resolution mechanisms. The league cannot treat Plaintiffs as a nonmember and still insist that they follow internal grievance procedures.

In addition, the Court notes that exhaustion of internal remedies is "a principle of policy rather than a limitation of the Court's jurisdiction of the subject-matter," *Gashgai*, 350 A.2d at 576.[19] The exhaustion doctrine reflects "an underlying judicial policy of deferring to an expertness which courts attribute to the other bodies involved" and can be waived when there "is no need of any additional expertise, as might be brought to bear by . . . further internal functioning . . . ." *Id.*

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[19]Virginia law appears to be similar, holding that at least in an administrative agency context, exhaustion is not required where there is no benefit to be gained from it. *Mosher Steel-Virginia v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985).

The issue posed here is essentially a legal one involving contract interpretation and does not present any specialized question in an area in which the league has particular expertise. Furthermore, the International League has already stipulated that it will seat whichever party the Court determines to be the rightful owner of the team. The Court interprets such a stipulation as a valid waiver of any claim by the league that the Court should await completion of further internal processes before acting. All parties have in fact made it quite clear to the Court they desire a prompt resolution so as to allow for the planning of the 1987 baseball season.

Although the Court concludes that the International League did breach its contract with the Plaintiffs by continuing to treat them as nonleague members after learning that they had not yet assigned their membership, it also concludes that the Plaintiffs are entitled to equitable relief only.[20] It is well settled that damages are not recoverable when uncertain, contingent, or speculative. "Damages must be grounded on established positive facts or on evidence from which their existence and amount may be determined to a probability." *Michaud v. Steckino*, 390 A.2d 524, 530 (Me. 1978). *See Gottesman & Co. v. Portland Terminal Co.*, 139 Me. 90, 27 A.2d 394 (1942). *See also Restatement (Second) of Contracts* § 352 (1979).

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[20]Plaintiffs have failed to request damages as a remedy in their first count, specifically asserting that no legal remedy would be adequate to cure both their actual and potential injury, and have instead opted to request equitable relief. This does not, however, preclude the Court from awarding damages, were it to find such relief appropriate. *See Perkins v. Remillard*, 84 F. Supp. 225 (D. Mass. 1949); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2664 (2d ed. 1983).

The Court concludes that damages are highly uncertain, contingent, and speculative in this case. First, it is impossible to accurately estimate how well the Plaintiffs' enterprise would have done without any breach by the International League. Kobritz himself admitted at trial that attendance and revenue are highly dependent on factors such as the weather, team performance, and whether or not the Boston Red Sox perform well enough to draw fans away from the Maine Guides. Each of these factors is entirely incapable of prediction. Furthermore, the Plaintiffs have failed to establish with any degree of certainty what effect, if any, the league's actions will have on their expenses or income given that they still have nearly two months to prepare for the season. Finally, the Court finds that the Plaintiffs failed to attempt to reduce or avoid any damages that might occur by not requesting an International League meeting solely on the issue of membership and forcefully laying out their position, and by not making those plans for the upcoming season that might reasonably still have been possible, despite the uncertainty about the team's status.

B. *Breach of Fiduciary Duty to a Minority Shareholder*

In Count II, Plaintiffs allege that the International League breached the fiduciary duty that was owed to them as minority shareholders in the league. The league argues that Plaintiff's are not true minority shareholders because each league member is an equal and that therefore there are no minority members. The Court does not accept the league's analysis; directors and officers of a nonprofit corporation owe a fiduciary duty to the corporation and this includes a duty to deal in good faith with the interests of those in a minority position with regard to any particular issue. This duty attaches regardless of

whether any members of an organization occupy an ongoing, formal minority status. However, although the Court concludes that a fiduciary duty was owed to Plaintiffs, it also concludes that this duty was not breached.

Under Maine law,[21] the directors and officers of a nonprofit corporation have a duty to act "in good faith with a view to the interests of the corporation and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." Me. Rev. Stat. Ann. tit. 13-B § 716 (1964). It is well settled in Maine and elsewhere that "[w]hether officers have been guilty of mismanagement in a particular case in largely a matter of fact dependent upon the circumstances of each case." 3 W. Fletcher, *Cyclopedia of the Law of Corporations* § 1030 at 597 (perm. ed. 1965). *See Atlantic Acoustical & Insulation Co. v. Moreira*, 348 A.2d 263 (Me. 1975). The Court finds that International League president Cooper's actions at the September 9 meeting were entirely reasonable given Kobritz's assertion at the meeting that he had reached a satisfactory agreement with McGee for the transfer of the franchies. Similarly, Cooper acted reasonably in not seating Kobritz at the September 22 meeting, given Kobritz's untimely and inadequate request and explanation.[22]

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[21]The Court concludes that an allegation of breach of fiduciary duty relates neither to corporate formation nor to corporate status and that therefore, under the parties' stipulation, Maine law must apply. The Court notes, however, that it would reach the same result under Virginia law.

[22]As previously noted, Kobritz's request came just minutes before the beginning of the meeting and was not accompanied

(Continued on following page)

Once Cooper was finally given documented evidence that actual assignment of the Maine franchise had not yet occurred (which he received from McGee, not Kobritz) he offered Kobritz an opportunity to request rescission of the league vote and full reinstatement as a member.[23] Kobritz declined this offer, failed to articulate his understanding of the situation to Cooper, and failed to make any concerted effort to resolve the situation short of litigation. Throughout this period, Cooper encouraged Kobritz to attend International League meetings and to speak at them. He shared league information with Kobritz and he saw to it that the prospective schedule for the 1987 International League season was drafted in a manner that would accommodate Kobritz should he be recognized as the franchise holder. The Court finds that the International League acted in good faith and with the required degree of diligence, care and skill to try to protect the best interests of the corporation and each of its members. There was no breach of fiduciary duty.

(Continued from previous page)

by any written documentation of the status of his arrangement with NEB. In addition, although Kobritz was an attorney and knew that Cooper was not, he never tried at this or any other point to explain to Cooper why he interpreted the constitution's language the way he did.

[23]Kobritz claims that he declined this offer because he felt it entailed submitting to International League jurisdiction the issue of who was the rightful owner of the franchise—a judgment he felt the league had no authority to make. However he failed to make the obvious counterproposal and request that the league meet solely to consider the proper interpretation of Article IV and whether Kobritz was still a member by virtue of the fact that there had never been a completed assignment from the Limited Partnership to NBI or MPSA.

C. *Wrongful Removal of a Director*

In Count III, Plaintiffs allege that the International League wrongfully removed Kobritz as a director of the league "in violation of the International League Constitution and in violation of the corporate laws of Virginia and the Common Law, and for which there is no adequate legal remedy." In both Maine and Virginia, the common law has been superseded by statutes authorizing shareholders to remove directors with or without cause. *See* Me. Rev. Stat. Ann. tit. 13-B § 704 (1964) and *Scott County Tobacco Warehouses, Inc. v. Harris,* 214 Va. 508, 201 S.E.2d 780 (1974) (discussing Va. Code Ann. § 13.1-42). Under these statutes, a viable cause of action for the wrongful removal of a director would have to be premised on procedural irregularities that would place the validity of the vote in doubt; the statutes severely limit any challenge to the motive of the voters or the merits of their decision. In the current case, the league did not wrongfully remove Kobritz as a director. It did, at his request, vote to approve an assignment of membership from his group to McGee's; this vote was perfectly proper. The allegations made by the Plaintiffs under Count III, *i.e.*, the denial of the rights and privileges of a director to Kobritz, are actually relevant to a claim of conversion, which the Plaintiffs have also made and which the Court will now address.

D. *Conversion*

As stated above, Maine law recognizes that certain intangible rights may be converted by an exercise of dominion or control over them that is inconsistent with the rights of their true owner. *See Ocean Nat'l Bank of*

Kennebunk v. Dimant, 462 A.2d 35 (Me. 1983). Again, the Court questions whether baseball league membership rights are "customarily merged in a document" and thus questions whether such rights may be converted. *See Restatement (Second) of Torts* § 242(2) (1964). Assuming *arguendo* that they may be, the Court nevertheless concludes that no conversion occurred.

Plaintiffs allege that the league interfered with the Limited Partnership's exercise of its league membership rights. However, in a case like the present one in which the league's initial actions were not wrongful, later wrongful interference will not constitute a conversion unless a proper demand and wrongful refusal have been made. Under the *Restatement (Second) of Torts* § 240(1) (1964), which by analogy governs the conversion of intangible rights,

> one in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right.

Two issues must therefore be resolved: did the league have cause for reasonable doubt to Plaintiffs' right to exercise membership privileges and, if so, did it make a qualified refusal for the purpose of affording a reasonable opportunity to inquire into the matter?

Prior to receiving a copy of the September 3 agreement on October 1, there is no question that the league's actions were entirely reasonable. Kobritz's comments at the September 9 meeting left a clear impression among league members that his transaction with McGee was com-

plete and final and contingent only upon league approval. It was perfectly reasonable for the league members to therefore believe that after their vote Kobritz ceased to be a member. Similarly, Cooper acted entirely reasonably when he declined to seat Kobritz at the meeting of September 22 and 23. Kobritz's claim that his arrangement with McGee was not final and that he was still a member was made only minutes before the meeting was called to order, and it was not supported at that time by any written documentation. The Court also concludes that Cooper's doubt as to Kobritz's membership was reasonable even after he received copies of the contract and learned that the closing between McGee and Kobritz had not yet occurred. Cooper's understanding that Article IV of the league constitution dictated that membership changed hands upon league approval was incorrect, but it was not unreasonable. The Court believes the assertions of Cooper and league vice-president Rosenfield that the clause had been consistently so interpreted by league members for many years. The language of the provision is not so clear as to make Cooper's interpretation an unreasonable one.

The Court also finds that Cooper's refusal to grant Kobritz membership rights was a qualified one, made for the purpose of affording a reasonable opportunity to inquire into who was properly entitled to exercise such rights. On at least three separate occasions, Cooper offered to call a special meeting to investigate the issue if Kobritz so requested. Cooper's first action after receiving Kobritz's letter of September 25 was to ask McGee if in fact there was a deal and to request documentation from him. Once Plaintiffs filed their suit against NBI on

October 21, Cooper decided to wait for the Court's determination of who properly owned the franchise, and on December 1 and several times thereafter, Cooper has indicated that he would recognize the prevailing party as a league member. Throughout this period Cooper took numerous steps to safeguard Kobritz's rights. He encouraged him to attend and speak at all league meetings, he canceled the meeting scheduled for November to allow the parties more time to settle the matter among themselves, and he required that the 1987 league schedule be constructed so that it could accommodate either party. In sum, Cooper did afford Kobritz an opportunity to have the matter investigated and was turned down by Kobritz; thereafter he decided to await the Court's determination of who properly owned the franchise, having received assurances from the Court that the matter would be expeditiously resolved. In the interim he took repeated affirmative steps to minimize any prejudice to Kobritz's rights. Plaintiffs' claim of conversion therefore fails.

E. *Tortious Interference with Contractual Relations*

Finally, Plaintiffs charge that the league tortiously interfered with their contractual relations with NBI. This claim is groundless. The tort of interference with a contractual relationship includes as one of its basic elements that the actor act with the purpose of interfering with the contract, that he desire to so interfere, or, under certain circumstances, that he at least know that interference will be a necessary consequence of his action. *Restatement (Second) of Torts* § 766, comment j (1977). In Maine, liability for tortious interference with a contract will attach only upon proof that such interference included some ele-

ment of fraud or intimidation. *MacKerron v. Madura,* 445 A.2d 680, 683 (Me. 1982). Plaintiffs have failed to produce any evidence that the league intended to interfere with their contractual relations or that their actions in any way were fraudulent or improperly intimidating.

VI. *The International League's Counterclaim and Third-Party Complaint*

As explained *supra,* at 7, the league's first claim has been bifurcated and its second claim is now moot. The league's third claim, tortious interference with business relationships or with prospective business advantage, fails for lack of proof of fraud or intimidation. *MacKerron v. Madura,* 445 A.2d 680, 683 (Me. 1983). (See discussion *supra.*) The league's final claim, alleging breach of contract, also fails. As discussed above, the league is estopped from claiming that Plaintiffs were bound to abide by the league constitution while at the same time maintaining that they were no longer a league member. Finally, as regards NBI and MPSA, the league has failed to offer any evidentiary support for its breach of contract allegation.

VII.

The foregoing findings of fact and conclusions of law support the judgment issued on February 20, 1987.

/s/ GENE CARTER
United States District Judge

Dated at Portland, Maine, this 11th day of March, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., Plaintiffs	
v.	Civil No. 86-0360-P
INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, Defendant, Third-Party Plaintiff	ORDER (Filed March 13, 1987)
v.	
MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY, Third-Party Defendant	

The International League's Count I seeks a declaration that Northeastern Baseball, Inc. and the Multi-Purpose Stadium Authority of Lackawanna County are obligated to pay any money judgment or award entered against the league in this action. The Court bifurcated this claim for disposition subsequent to the main dispute in this case.

Having declined to enter any such money judgment or award, the Court hereby *ORDERS* that the International League's Count I be *DISMISSED* as moot.

/s/ C. E. Wilde,
Deputy Clerk

/s/ GENE CARTER
United States District
Judge

Dated at Portland, Maine this 13th day of March, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, et al., Plaintiffs	Civil No. 86-0331-P
v.	
NORTHEASTERN BASEBALL, INC., Defendant	
	[CONSOLIDATED ACTIONS]
TRIPLE-A BASEBALL CLUB ASSOCIATES, et al., Plaintiffs	
v.	Civil No. 86-0360-P
INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL, CLUBS, Defendant	

ORDER ENTERING JUDGMENT ON REMAND

(Filed November 24, 1987)

The above-entitled matter now being before the Court on remand from the Court of Appeals for the First Circuit, pursuant to its mandate entered on October 13, 1987, and on request for entry of judgment herein in conformity with the aforesaid mandate, it is hereby *ORDERED* that judgment be entered herein as follows:

(1) Judgment is entered for Defendant Northeastern Baseball, Inc. in the actions against it by the Plaintiffs;

(2) Judgment is entered for Defendant Multipurpose Stadium Authority in the action against it by Plaintiffs;

(3) Judgment is entered for the International League in the action against it by the Plaintiffs;

(4) The cross-claims of the International League against Northeastern Baseball, Inc. and Multipurpose Stadium Authority seeking contribution and indemnification are hereby *DISMISSED* as *MOOT;*

(5) Judgment is entered for Defendant Northeastern Baseball, Inc. on its counterclaim for specific performance of the contracts of September 3 and September 4, 1986 against the Plaintiffs, and it is hereby *ORDERED* that Triple-A Baseball Club Associates shall specifically perform the September 3 and September 4, 1986 contracts by conveying all of its right, title and ownership in its baseball franchise in the International League to Northeastern Baseball, Inc. upon payment of the sum of Two Million Dollars ($2,000,000.00), such transfer to be in accordance with the terms and provisions of the aforesaid contracts and the opinion of the Court of Appeals for the First Circuit filed on October 13, 1987; and it is hereby *FURTHER ORDERED* that Northeastern Baseball, Inc. shall make its first payment under the September 4, 1986 contract at the same time as the International League franchise is transferred to Northeastern Baseball, Inc., and such date shall be the starting date for the annual payments prescribed in the September 4 contract.

Costs herein are awarded to Northeastern Baseball, Inc. No costs are allowed in the actions against and for International League of Professional Baseball Clubs.

COPY

William S. Brownell, Clerk

/s/ C. E. Wilde
Deputy Clerk

/s/ Gene Carter
United States District Judge

Dated at Portland, this 24th day of November, 1987.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

William S. Brownell
Clerk

P.O. Box 7505 DTS
Portland, Maine 04112

January 4, 1987

TRIPLE-A BASEBALL CLUB ASSOCIATES, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 86-0331 P
NORTHEASTERN BASEBALL, INC.,	)	
Defendant.	)	
TRIPLE-A BASEBALL CLUB ASSOCIATES, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 86-0360 P
INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS,	)	
Defendant.	)	

TO: *ALL COUNSEL OF RECORD*

Enclosed is a copy of the Order Supplementing Order Entering Judgment on Remand which was filed on January 4, 1988.

Very truly yours,

WILLIAM S. BROWNELL, Clerk

By: /s/ Connie Wilde
Deputy Clerk

B/ cew
Enc.
cc: Keith A. Powers
Thomas B. Wheatley
John Ciraldo
Richard S. Bishop
Frank A. Ray
Joseph M. Cloutier

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 86-0331-P
NORTHEASTERN BASEBALL, INC.,	)	
Defendant.	)	
	)	[CONSOLIDATED ACTIONS]
TRIPLE-A BASEBALL CLUB ASSOCIATES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 86-0360-P
INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS,	)	
Defendant.	)	

ORDER SUPPLEMENTING
ORDER ENTERING JUDGMENT ON REMAND

After hearing held this date, the Court hereby supplements its Order Entering Judgment on Remand, filed on November 24, 1987, by adding thereto paragraph (6), reading as follows:

(6) It is hereby *ORDERED* that the parties in this action and all persons, firms, or entities party to the contracts of September 3 and September 4, 1986, referred to hereinabove in paragraph (5), shall hold a closing on January 19, 1988 at 9:00 a.m., at a location to be agreed upon by the parties to such closing, at which closing shall be accomplished the conveyance of title ordered by the Court hereinabove in paragraph (5).

/s/ Gene Carter
United States District Judge

Dated at Portland, this 4th day of January, 1988.

A TRUE COPY
ATTEST: William S. Brownell, Clerk

By /s/ A.E. Wilde
Deputy Clerk

No. 87-1178

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRIPLE-A BASEBALL CLUB ASSOCIATES, TRIPLE-A BASEBALL CLUB OF MAINE, INC., AND JORDAN I. KOBRITZ,

PETITIONERS,

v.

NORTHEASTERN BASEBALL, INC., and MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

The petition seeks to raise an issue which respondents believe may more properly be stated as follows:

Whether, in determining that under Maine Law specific performance was the appropriate remedy for breach of a contract for sale of a Triple-A baseball franchise without remanding to the District Court for a decision on that issue, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

RULE 28.1 LISTING

Respondent Northeastern Baseball, Inc. is a non-profit, non-stock Pennsylvania corporation, which has a self-perpetuating board made up of community volunteers who reside in Lackawanna County or Luzerne County, Pennsylvania.

Respondent Multi-Purpose Stadium Authority of Lackawanna County is a public authority of the Commonwealth of Pennsylvania. Its members are appointed by the Board of County Commissioners of the County of Lackawanna, Pennsylvania. The Multi-Purpose Stadium Authority of Lackawanna County is under common control with the Northeastern Pennsylvania Sports Development Corporation, a non-profit stock corporation with 2 shares of stock, in that one share is owned by the County of Lackawanna, Pennsylvania. The other share is owned by the County of Luzerne, Pennsylvania.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

In the
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1178

TRIPLE-A BASEBALL CLUB ASSOCIATES,
TRIPLE-A BASEBALL CLUB OF MAINE, INC.,
AND JORDAN I. KOBRITZ,
PETITIONERS,

v.

NORTHEASTERN BASEBALL, INC., and
MULTI-PURPOSE STADIUM AUTHORITY
OF LACKAWANNA COUNTY,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in this case. See Petition ("Pet.") at 3. This case arises from the refusal of Petitioners (Triple-A Baseball Club Associates, and its general partners

Jordan I. Kobritz and Triple-A Baseball Club of Maine, Inc.) to convey a Triple-A baseball franchise to Respondent Northeastern Baseball, Inc. ("NBI") in accordance with an Agreement dated September 3, 1986.[1]

The September 3 Agreement was the culmination of an 8-year search by John McGee, President of NBI, to acquire a Triple-A baseball franchise for the Scranton, Pennsylvania area. The acquisition of Petitioners' Triple-A franchise was particularly important to NBI because of the rarity with which such Triple-A franchises are available for sale. Indeed the uncontradicted testimony of the President of the International League of Professional Baseball Clubs (the league to which Petitioners' Triple-A franchise belonged) was that there had been only one transfer of an International League franchise in the last ten years and that involved the transfer to Petitioners of the franchise at issue in this case.

Under the September 3 Agreement (Pet. App. 35-39), Petitioner Triple-A Baseball Club Associates (the "Limited Partnership") contracted to convey its Triple-A franchise to NBI for $2.4 million (¶¶ 1 & 2), and NBI contracted to convey its Double-A franchise to the Limited Partnership for $400,000 (¶¶ 3 & 4), but the transfer of the Double-A franchise was subject to the approval of the Eastern League (¶ 9). If the Eastern League refused to approve the transfer, the agreement for the sale of the Triple-A franchise was to remain in full force and effect at a reduced price of $2 million (¶ 5). A separate side agreement was entered into between NBI and Petitioner Kobritz (Pet. App. 40-42), which provided that in the event the Eastern League failed to approve the transfer of NBI's Double-A team to the Limited Partnership, it would be transferred to Kobritz individually for $500,000 (¶ 1), and NBI

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[1] NBI assigned its rights under the September 3 Agreement to Respondent Multi-Purpose Stadium Authority of Lackawanna County, but reserved the right to enforce the Agreement.

and Kobritz would enter into a consulting agreement which would pay Kobritz the same amount ($500,000). The side agreement further provided that in the event the Eastern League denied approval of the transfer of the Double-A franchise to Kobritz, Kobritz would still be paid the consulting fees reduced (but not below $400,000) by the amount of any indemnification damages NBI is required to pay the Eastern League for acquiring the Triple-A International League franchise (¶ 3) (as a result of the Eastern League's claim to Scranton as Eastern League territory).

The Eastern League refused to approve the transfer of NBI's Double-A franchise, and instead made a non-negotiable demand that NBI relinquish its Double-A franchise to the Eastern League in satisfaction of its claim that Scranton was Eastern League territory.[2] NBI appeared at the scheduled closing under the September 3 Agreement, and was ready, willing and able to pay the $2 million for the Triple-A franchise. Petitioners, however, refused to convey the Triple-A franchise on the pretext that NBI had breached the September 3 Agreement by being unable to transfer its Double-A franchise.

On the same day as the closing, Petitioners filed their original Complaint for declaratory judgment against NBI. NBI counterclaimed for a declaratory judgment and for breach of contract, and sought, *inter alia*, an order that Petitioners specifically perform their obligations in accordance with the September 3 Agreement and transfer the Triple-A franchise to NBI.

The case was tried to the District Court jury waived. The findings of fact in the District Court's Opinion (Pet. App. 58-94) detailed the reasons for its conclusion that NBI "acted in good faith throughout the transaction" (Pet. App. 102) and

[2] Petitioners' brief contains several inaccuracies about the events surrounding the Eastern League's refusal to approve the transfer and the communications between NBI and Kobritz about the Eastern League's refusal. Since these inaccuracies do not directly bear on the appropriateness of this Court granting a writ of certiorari, Respondents will not address them in this brief.

"attempted in good faith and without pretense to obtain Eastern League approval of the transfer" (*Id.*). However, the District Court concluded that the "refuse to approve" language in paragraph 5 of the Agreement was ambiguous (Pet. App. 103), and then read into the agreement an implied condition precedent that the refusal to approve be "on the merits" (Pet. App. 105-06), apparently in the form of "a formal vote by the league directors disapproving the sale on the merits" (Pet. App. 103). The District Court declared that the September 3 Agreement (Pet. App. 35-39) terminated by its own terms in accordance with paragraph 14 of the agreement on the failure of an implied condition precedent (Pet. App. 47 and 106). In doing so, the District Court simply misread the September 3 Agreement and reversed the effect of its language in favor of the drafters (the Petitioners), which would entitle them to keep the Triple-A franchise in Maine and avoid their obligations to convey it to NBI.[3]

In a detailed decision, the U.S. Court of Appeals for the First Circuit reversed the District Court's decision and held that "by rewriting the contract between the parties," the District Court "violated the basic principles of contract law."

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[3] The district Court failed to recognize that the only conditions precedent were those specified in paragraph 10. Paragraph 10 (Pet. App. 38) specified three conditions precedent: (A) approval by NBI's Board of Directors by September 11, 1986, (B) approval of the transfer of the Triple-A franchise to NBI by the International League by September 11, 1986, and (C) approval by the Limited Partners of Triple-A Baseball Club Associates by September 11, 1986. Paragraph 14 (Pet. App. 39), upon which the District Court erroneously relied in declaring that the agreement terminated by its own terms, provided that in the event two out of three of those "foregoing conditions" shall not have occurred (the exception being approval by NBI's Board), then the deposit with accrued interest shall be refunded to NBI, and thereafter the Agreement shall terminate. Paragraph 14 also provided that in the event those two conditions specified in Paragraph 10, other than approval by NBI's Board, were met, the deposit would be retained as liquidated damages. All three of the conditions precedent of Paragraph 10 were met, and consequently the agreement could not have terminated by its own terms under Paragraph 14.

Triple-A Baseball Club Associates v. *Northeastern Baseball, Inc.*, 832 F.2d 214, 220 (1st Cir. 1987); Pet. App. 13-14. Specifically, the Court of Appeals held that the District Court erred in finding the September 3 Agreement to be ambiguous and in reading into that agreement an implied condition precedent:

> We do not find the phrase "refuse to approve the sale" ambiguous. Unlike the District Court, we think the term is clear and does not need to be defined. The words "refuse to approve" are only susceptible of one meaning; they mean what they say. . . .
>
> [The District Court] found, based on extrinsic evidence that the term [refuse to approve] had to be interpreted to mean there was an implied-in-fact condition precedent that the refusal had to be "on the merits." With due respect, we think the phrase, "on the merits" not only changes the sparse plain language of the contract but is itself ambiguous.

832 F.2d at 221; Pet. App. 17.

The Court of Appeals consequently concluded that the Agreement should be enforced as it was actually written, which would result in the transfer of the Triple-A franchise to NBI. After noting that it was unable to find any Maine case deciding the precise question of whether specific performance is appropriate with respect to the sale of a franchise (832 F.2d at 223; Pet. App. 21), the Court of Appeals carefully examined Maine law on specific performance (832 F.2d at 222-23; Pet. App. 20-21) as well as the unanimity of the relevant law in other jurisdictions (832 F.2d at 223-24; Pet. App. 21-24), and determined that specific performance was the appropriate remedy for breach of a contract for sale of a baseball franchise (832 F.2d at 224-25; Pet. App. 24-26). Accordingly, the Court of Appeals remanded the case to the District Court with directions to issue a decree of specific performance ordering that

"upon payment of two million dollars, Triple-A Baseball Club Associates shall forthwith convey all of its right, title and ownership in its baseball franchise in the International League to Northeastern Baseball, Inc." 832 F.2d at 228; Pet. App. 34-35. On November 3, 1987, Petitioners moved for a stay of the Court of Appeals' mandate pending petition for writ of certiorari, which the Court of Appeals denied.

The District Court by Order Entering Judgment on Remand dated November 24, 1987, entered judgment on NBI's counterclaim and ordered that the Petitioners perform the September 3 Agreement. Pet. App. 132-34. By Supplemental Order dated January 4, 1988, the District Court ordered the closing to take place at 9:00 a.m. on January 19, 1988. Pet. App. 137-38. At the closing on January 19, 1988, Petitioners refused to convey the team as required by the District Court's Order. Therefore, by Order Vesting Title dated January 20, 1988, the District Court, pursuant to its power under Fed.R.Civ.P. 70, transferred the title to the Triple-A franchise to NBI. The Order Vesting Title, which was issued after Petitioners' petition was filed in this Court, is reproduced as an appendix to this brief, *infra* at 11.

Summary of Argument

Petitioners seek to invoke this Court's certiorari jurisdiction because they disagree with the Court of Appeals' decision on Maine Law on the issue of the appropriateness of specific performance for the breach of a contract for sale of a Triple-A baseball franchise. Although Petitioners' real complaint is with the Court of Appeals' determination of the substantive State law on this issue, in order to bring their appeal within the requirements for a writ of certiorari, Petitioners' recharacterize the issue as the Court of Appeals' failure to remand this case to the District Court for determination of the appropriateness of specific performance as a remedy. However, in light of the Court of Appeals' careful analysis of Maine

Law as well as the unanimity of the relevant case law of other jurisdictions, and in light of the record and findings of fact which were before the Court of Appeals, it is patently clear that the Court of Appeals did not depart from the accepted and usual course of judicial proceedings so as to require intervention by this Court through the use of its certiorari jurisdiction. Indeed, rather than departing from judicial precedent, the Court of Appeals' decision comports with the case law in this area as well as with principles of judicial economy.

Argument

The decision by the Court of Appeals is not in conflict with any decision of another court of appeals on the same matter; no federal question was involved in this case; and the Court of Appeals did not depart from the accepted and usual course of judicial proceedings nor did it sanction such departure by the District Court. Respondents, therefore, respectfully submit that this case does not warrant exercise of this Court's certiorari jurisdiction. See Rule 17.1(a) of the Rules of this Court.

Petitioners' sole stated basis for their Petition for a Writ of Certiorari is their contention that the Court of Appeals' direction to the District Court for an entry of specific performance in this case was so far outside the bounds of accepted judicial proceedings as to call for an exercise of this Court's power of supervision. Pet. at 3. There are several fatal flaws to that argument.

1. The Court of Appeals followed the only other federal court decision directly on point in this area. In directing the District Court to enter a decree of specific performance without first remanding that issue to the District Court for a determination, the Court of Appeals followed the decision of the Court of Appeals for the Eighth Circuit in *Laclede Gas Co.* v. *Amoco Oil Co.*, 522 F.2d 33, 38-40 (8th Cir. 1975). *Triple-A Baseball Club Associates*, 832 F.2d at 222; Pet. App. 20. A similar result was reached in *United States* v. *Harrison*

County, Mississippi, 399 F.2d 485 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970) (Circuit Court reversed trial court's interpretation of contract and remanded with directions to enforce contract terms by injunction). *See also Wray* v. *Harris*, 350 So.2d 409 (Ala. 1977).

Petitioners cite no authority contrary to *Laclede*; there is no split of authority in the circuits. Instead Petitioners seek to discredit the Court of Appeals' reliance on *Laclede* by stating that "*Laclede*, which hinged on a peculiarity of Missouri law, is simply inapplicable to this case . . . ." Pet. at 15. However, an examination of Missouri law reveals that the principles governing specific performance under Missouri law are very similar to the principles which govern under Maine law. Both Missouri and Maine recognize that specific performance is within the discretion of the Court, but this discretion is not unbounded since it must be exercised within the constraints of the doctrines and principles of equity. *Compare Eisenbeis* v. *Shillington*, 349 Mo. 108, 159 So.2d 641 (1941), and *Rockhill Tennis Club* v. *Volker*, 331 Mo. 947, 56 S.W.2d 9 (1932), *with Telegraphone Corp.* v. *Canadian Telegraphone Co.*, 103 Me. 444, 69 A. 767 (1908), and *Hull* v. *Sturdivant*, 46 Me. 34, 41 (1858).

Moreover, like Missouri, Maine recognizes there are certain types of contracts for the breach of which specific performance will routinely be decreed. *Hull* v. *Sturdivant*, 46 Me. 34, 41 (1858) ("Where a contract, respecting real property, is in its nature and circumstances unobjectionable, it is as much a matter of course for a Court of Equity to decree a specific performance, as it is for a Court of Law to give damages . . . .")

2. Significantly, Petitioners cite no authority for the proposition that specific performance is not the appropriate remedy for breach of a contract to sell such a franchise, as all authority is to the contrary. The Court of Appeals simply determined that contracts for sale of a baseball franchise

(much like contracts for sale of real property) come within the category of cases in which specific performance is routinely decreed. In coming to this determination, the Court of Appeals followed unanimous case law precedent.

As the Court of Appeals correctly noted, every court which has addressed the issue of the appropriateness of specific performance of a contract for sale of a franchise has concluded that specific performance is the appropriate remedy. *Triple-A Baseball Club Associates*, 832 F.2d at 223; Pet. App. 21-22, *citing Specific Performance of Agreement for Sale of Private Franchise*, 82 A.L.R.3d 1102 (1978). Thus, in predicting that Maine law would follow the other jurisdictions which had addressed the issue, the Court of Appeals was certainly not departing from the usual course of judicial conduct. Rather its decision on this issue placed it squarely in line with the universal case law precedent in this area. *See, e.g., Leasco Corp.* v. *Taussig*, 473 F.2d 777, 785-786 (2d Cir. 1972); *DeBauge Brothers, Inc.* v. *Whitsitt*, 212 Kans. 758, 512 P.2d 487, 489-490 (1973); *Bidwell* v. *Long*, 14 App. Div.2d 168, 218 N.Y.S.2d 108, 110 (1961); *Hogan* v. *Norfleet*, 113 So.2d 437, 439 (Fla. Dist. Ct. App. 1959); *Cochrane* v. *Szpakowski*, 355 Pa. 357, 49 A.2d 692, 694 (1946).

3. Furthermore, from the standpoint of judicial economy, Petitioners' argument makes no sense. The issue of the proper remedy for a breach of the September 3 Agreement had been tried in the District Court and briefed at both the trial and appellate levels. Given the clearly unique nature of a Triple-A franchise and the unanimous case law in this area, it would have been an unnecessary use of scarce judicial resources for the Court of Appeals to remand this issue to the District Court and then wait for an appeal by the disappointed party in order to render the eventual decision that specific performance was the appropriate remedy.[4]

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[4] Petitioners' primary argument against a decree of specific performance, both at the trial and appellate level, was that NBI already owned a Double-A franchise and thus should be precluded from obtaining the Triple-A fran-

4. In the final analysis, Petitioners simply disagree with the Court of Appeals' assessment of what the Maine Supreme Judicial Court would have decided if faced with the issue of the appropriateness of specific performance when a contract for the sale of a Triple-A baseball franchise has been breached. The Petitioners' disagreement with the First Circuit's interpretation of state law is not only unfounded, but even if correct would not be a proper basis on which to base a petition for writ of certiorari.[5]

Conclusion

For the foregoing reasons, Respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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chise. Pet. at 16 n.7. However, as the Court of Appeals noted, this argument is way off base given the vast differences between a Double-A and a Triple-A baseball franchise. *Triple-A Baseball Club Associates*, 832 F.2d at 224-225; Pet. App. 25-26. Indeed, under Petitioners' argument an art collector could not obtain specific performance of a contract to purchase a painting by Van Gogh if he already owned a Norman Rockwell painting.

[5] One basis for certiorari under the 1970 Rules was "Where a court of appeals... has decided an important state or territorial question in a way in conflict with applicable state or territorial law" (1970 Rule 19(1)(b)), but that basis for certiorari was eliminated by the 1980 Revision. 13 J. MOORE, H. BENDIX AND B. RINGLE, *Moore's Federal Practice* ¶ 817.01[3] at SC 17-8 (2d ed. 1985).

Appendix

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., PLAINTIFFS, v. NORTHEASTERN BASEBALL, INC., DEFENDANT.	CIVIL NO. 86-0331-P
TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., PLAINTIFFS, v. INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, DEFENDANT.	(CASES CONSOLIDATED BY AGREEMENT) CIVIL NO. 86-0360-P

ORDER VESTING TITLE

By judgment entered on November 24, 1987, this Court ordered the specific performance of the September 3 and September 4, 1986 contracts between the parties in these cases for conveyance of all plaintiffs' right, title and ownership in

their franchise in the International League to Northeastern Baseball, Inc. upon payment of the sum of two million dollars ($2,000,000.00). This transfer was to be in accordance with the terms and provisions of the contract and of the opinion of the Court of Appeals for the First Circuit in this matter, filed on October 13, 1987. No conveyance took place and on January 5, 1988 a hearing was held on Defendant Northeastern Baseball, Inc.'s Motion to Compel Compliance with Court Order. That hearing resulted in an Order Supplementing Order Entering Judgment on Remand, filed January 4, 1988, which ordered the parties to the contracts to hold a closing at 9:00 a.m. on January 19, 1988 to accomplish the conveyance of title previously ordered by the Court.

At a hearing held this morning, January 20, 1988, the Court learned through the representations of counsel for all parties, that the closing and conveyance ordered by the court for January 19, 1988, did not go forward because Plaintiffs reserved from the bill of sale all rights, including territorial rights, which Triple-A Baseball Club Associates may possess under the National Association Agreement and the various league constitutions. Although the status of territorial rights was not resolved at the time of the Court's hearing on January 4, the Court's file in this matter now contains a letter dated January 12, 1988, from counsel for Defendant International League of Professional Baseball Clubs, and a letter dated January 11, 1988, by Harold M. Cooper, President of the International League of Baseball Clubs, stating the League's position on territorial rights as an incident of ownership of a franchise, which is based in part upon the undisputed provisions of section 10.06(c) of the National Association Agreement.[1] The letter of counsel states that

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[1] The letter from Frank A. Ray, counsel for the International League, represents that section 10.06(c) of the National Association Agreement provides:

> Upon a League granting any person, firm or corporation membership in its League for the purpose of operating a Baseball franchise in a

> any transfer of membership or sale of a franchise in the League which is approved by the League is subject to maintenance of territorial rights associated with the franchise. In other words, until such time as the subject franchise leaves Old Orchard Beach, Maine, the ten mile radius of territorial rights is retained by the owner of the franchise and by the League.

The letter from Mr. Cooper to John McGee, dated January 11, 1988, confirms that

> the International League has approved the sale of the franchise to Northeastern Baseball, Inc., and its assignee Multi-Purpose Stadium Authority. Our constitution permits a member to operate within a city or area within the circuit of this league which is known as the "franchise territory." In this case, Maine (Old Orchard Beach).

The court relies on these documents provided by the International League because, as Charles Eshbach, President of the National Association of Professional Baseball Leagues, Inc., has stated in a letter to Plaintiff Kobritz of January 19, 1988, the issue of territorial rights has been determined by the Executive Committee of the Association to be a matter not within its jurisdiction "but rather . . . a matter to be handled at the league level as a league matter."

The Court hereby finds that the disputed territorial rights are a legal incident of ownership of the subject franchise and that they must be conveyed with the subject franchise under the agreements of September 3 and 4.

Rule 70 of the Federal Rules of Civil Procedure provides the Court with a procedure for enforcing an order for a specific act which has not been completed within the time specified:

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city, such a membership shall carry with it protected territorial rights for the area within said city limits and within the ten (10) mile area above referred to. Such rights shall continue during the life of said membership.

"If the real or personal property is within the district, the court . . . may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law."

The Court finds that the franchise in question is within this district and that its orders for conveyance of that transfer on January 19, 1988 have not been complied with.

Accordingly, is is hereby ORDERED that upon payment of two million dollars ($2,000,000.00) by Defendant Northeastern Baseball, Inc., by Noon tomorrow, January 21, 1988, Plaintiff Triple-A Baseball Club Associates will be divested of its unencumbered title, by force of this Order, in its franchise in the International League of Professional Baseball Clubs, and all right, title and ownership in the franchise, specifically including territorial and all other rights which Triple-A Baseball Club Associates may possess under the National Association agreement and the various league constitutions and by-laws, will be hereby vested in Northeastern Baseball, Inc.

This Order shall be effective to transfer title as aforesaid upon filing with the Clerk of this Court by Owen W. Wells, Esq., counsel for Northeastern Baseball, Inc., of an affidavit reciting under oath that he has delivered to Plaintiffs' counsel, Keith A. Powers, Esq. a bank check in the amount of two million dollars ($2,000,000.00) payable to Triple-A Baseball Club Associates.

s/ GENE CARTER
GENE CARTER
United States District Judge

Dated at Portland, Maine this 20th day of January, 1988.